

REPORTS OF CASES

ADJUDGED

IN THE

COURT OF CHANCERY

UPPER CANADA.

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REPORTS OF CASES

ADJUDGED

IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

BETWEEN THE FIRST DAY OF NOVEMBER, 1849, AND THE FIRST
DAY OF DECEMBER, 1850.

BY

ALEXANDER GRANT, Esquire,

BARRISTER-AT-LAW.

VOLUME I.

SECOND EDITION, REVISED AND CORRECTED.

TORONTO:

HENRY ROWSELL,
KING STREET.

1861.

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UPPER CANADA

BETWEEN THE FIRST DAY OF NOVEMBER 1881 AND THE FIRST
DAY OF DECEMBER 1881

ROWSELL & ELLIS, PRINTERS, KING STREET, TORONTO.

ALEXANDER CHASE, Plaintiff

vs.

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PRINTED

1881

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 “ “ J. CHRISTIE P. ESTEN, *Vice-Chancellors*.
 “ “ ROBERT BALDWIN, *Attorney-General*.
 JOHN SANDFIELD McDONALD, Esq., *Solicitor-General*.

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COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING IN NOVEMBER, 1849.

HAMILTON V. THE DESJARDINS CANAL COMPANY.

Pleading—Parties.

Where the directors of an incorporated company misappropriate the funds of the corporation, a bill against them and the company in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all, except the directors. The company must be made plaintiffs, whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings. 1849
Nov. 2, 6, 13.

Where by the act of incorporation the government is authorised to purchase the corporate estate on payment of its full value, the Attorney-General is not a necessary party to a bill by the stockholders against the directors, complaining of the improper conduct on the part of the latter in dealing with the corporate funds.

In such a case, the defendants having answered, admitting certain moneys to have been received by the directors, a motion to pay the amount into court was refused—but the costs of the motion were reserved.

The bill in this case was filed by *James Hamilton*, the Honourable *J. H. Dunn*, *John O. Hatt* and others, stockholders in the *Desjardins Canal Company*, on behalf of themselves and all others the stockholders, except the defendants, who should come in and contribute to the suit, against *John Paterson*, *James Coleman*, *Benjamin Overfield*, *William Dixon*, *John Gamble*, shareholders in the said Company and *The Company*—and stated the incorporation of the company by statute (of Upper Canada) 7 Geo. IV., ch. 18—setting forth in detail, several of the clauses thereof relating to the election of officers and their duties, one of them being, that the directors of the company should once in every three years, or oftener if required by the stockholders, at a general meeting, render an exact and particular statement of the affairs of the company. It also appeared by the bill that the canal had been constructed so as to permit of its being used, and that a large sum had been received by the directors for tolls, &c. Statement.

The bill then went on to recite the act of 9 Vic., ch. 85,

1849. whereby the company was authorised to raise, by way of loan, £25,000, to be secured on the canal, and the tolls levied thereon; and that the securities given under that act should take precedence of all other claims on the canal; the act also directed that, immediately on affecting such loan, or any part thereof, the directors should pay the amount loaned into one of the chartered banks, to be drawn out by the cheque of the president, countersigned by one of the directors, and by the engineer employed by the company to superintend the works; and that such loan should be applied only to the improvement of the works. And by the third section it was further enacted, that it should be the duty of the president and directors to pay into the bank, at least once a week, all the tolls or other moneys received for the company, and all moneys then due to or in the hands of the company, and the same was to be drawn out only for the purposes of, or for paying off, some debt due from the company at the time of drawing out the same, and that each cheque should be countersigned by a director, and specify the particular demand it was to be applied in payment of.

Statement.

That the said sum of £25,000, or any part thereof, was never raised, but that large sums were obtained from the government of Upper Canada and applied in constructing the canal. That *Paterson* was elected a director in 1841, and had continued ever since to be president of the company. The bill then alleged that *Paterson* had alone acted in the affairs of the company, until the election of the other defendants as directors, and had possessed himself of the books, papers and effects of the company; that *Coleman* was elected a director in 1847, *Overfield* and *Gamble* in 1848, and had since continued to be directors, but that *Paterson* assumed the sole control of the affairs of the company, to the exclusion of the other defendants; that *Paterson* had received the tolls and other moneys of the company, and had applied them to his own use, or loaned them out, sometimes on security, and sometimes without any security, being given; and had in 1847, with the consent and privity of *Coleman*, *Overfield* and *Gamble*, lent to *Dixon* £300, who was then and still is one

of the directors; and that, in the same year, *Paterson*, with the consent and privity of *Coleman*, *Overfield* and *Dixon*, lent £190 to *Gamble*, and with the consent of the other defendants, had lent £200 to one *Spencer*; and that *Dixon*, *Gamble* and *Spencer* had respectively executed some pretended security to *Paterson* for the money so loaned.

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That *Paterson* had refused to render any account of the money or affairs of the company, and that the other defendants encouraged and abetted him in so refusing.

That the plaintiffs had frequently applied to *Paterson*, *Dixon*, *Coleman*, *Overfield*, and *Gamble* to come to an account with the company, and had also “applied to the *Desjardins Canal Company*, as well to insist upon the other defendants accounting with them, and with your orators and others, the shareholders, respecting the matters aforesaid, as also to account with your orators respecting the affairs of the company.” The bill then charged combination and confederation on the part of the defendants, and proceeded to state :

That *Hamilton* and *Hatt* being dissatisfied with the management of the company, submitted three resolutions to the meeting of the stockholders, held on the 3rd of April then last, in pursuance of the act, to the effect :

That the president, &c., of the company should cause to be made out a statement, in detail, of the receipts, &c., of the company :

That a statement should be exhibited of the debts due by and to the company, money in hand, money loaned, if any, to whom loaned, upon what security and for what periods; and

That a general meeting of the stockholders should be called in the month of May then ensuing, for the purpose of laying such statements before them, and devising means for completing the canal.

That upon the resolutions being submitted to the meeting, *Paterson*, who acted as chairman, undertook on behalf of himself and the other directors, that if the resolutions were withdrawn, the object thereof would be carried out by the president and directors, and that upon the faith of such undertaking of *Paterson* the resolutions were withdrawn.

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That the period for calling the meeting having expired, without any thing having been done, *Hamilton* waited on *Paterson* and required him to call the meeting, which he declined, unless upon a requisition so to do by a majority of the shareholders, which having been obtained, the president and directors called the meeting at Toronto, instead of at Dundas, as required by the requisition, at which meeting *Hamilton* and *Hatt* attended, and protested against the same as illegal, and as being contrary to the provisions of the act of parliament, and to the requisition. That the president produced at such meeting a statement of the affairs of the company, to which *Hamilton* and *Hatt* objected as being not explicit enough, but grossly incorrect and insufficient.

Statement.

That *Paterson*, as president of the company, (and being president of the town council of Dundas,) had lent to the town of Dundas £1000 of the money of the company, and that for securing the payment thereof, *Paterson*, as president of the town council, executed to *Coleman*, also, a member of the town council, a mortgage on certain property of the town of Dundas, and the mortgage was witnessed by one *Holt*, also a member of the town council, and purported to be for securing £1500 and interest.

That for the purpose of making this transaction appear to have been done in good faith, *Coleman* assigned the mortgage to *Paterson*, as president of the canal company.

That these transactions are not, nor is either of them, entered in the books of the company.

That the defendants, other than the company, ought to account for all moneys of the company, and to discover and set forth an account thereof, and to whom lent, &c. That *Paterson* had applied moneys of the company to his own use, without giving any account thereof; that the other directors threatened and intended to give *Paterson* some very long time to pay the company the amount due by him.

The bill then prayed an account of all the dealings of the company, and for an injunction restraining the defendants, and each and every of them, from receiving

any further tolls, rents, &c., of the company, arising from 1849.
 the said canal or otherwise, or from interfering with the
 affairs of the said company, or the conduct or management
 thereof, *until* the election of some fit and proper person and
 persons *as the president and directors of the said company*,
 and that in the mean time a receiver should be appointed,
 and for further relief.

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The defendant *Paterson*, by his answer, admitted having made loans of the money as stated, but that the same was loaned on each occasion in good faith, and with a view to realize interest on whatever funds might be on hand; denied excluding the other directors from the management of the affairs of the company and refusing to account, and stated that every year, since his appointment, he had caused an annual statement of the affairs of the company to be made: admitted his having undertaken to call the meeting, and his refusal to comply therewith, as stated in the bill; and that he had subsequently called the meeting referred to in the bill at Toronto, as the greatest amount of stock was held by persons residing in and about that city; and that at that meeting the acts of the defendant, and the other directors, were approved of by the majority of the shareholders.

Statement.

The defendant denied having derived any personal benefit from lending the funds, but that he had made use of £350 of the funds of the company, which he was willing to pay interest upon, and that in the books of the company he was charged with the sum of £2351, which included the sum so applied to his own use, and that he had always been ready and willing to give security for all sums loaned out by him, as well as the sum of £350, but on offering to the solicitor of the company to give such security he declined, saying that it was unnecessary.

The defendant also stated in his answer, that he had executed a mortgage to government for £12,000 on account of the debt due by the company to the government in respect of this canal, and loaned by government to the company, under the authority of the statutes (of Upper Canada) 2 W. IV., ch. 4; 5 W. IV., ch. 34; 7 W. IV., ch. 65; and to secure which the canal was mortgaged to the government.

1849. It appeared by the answer that, since the filing of the bill, a new election of officers had been had, and that *Paterson*, *Overfield*, *J. B. Ewart*, *James Smith* and the plaintiff *Hamilton*, were chosen directors, and *Paterson* was subsequently re-elected president; and two schedules were attached to the answer, shewing what securities were held by the company for the moneys loaned. And defendant submitted that under such circumstances, it was not competent for the minority of the shareholders of an incorporated company, who are not liable for debts, &c., beyond the stock paid in, to call upon defendant, under the decree of the court, nor for the court to enjoin him against carrying on the affairs of the company, after having been elected so to do by a majority of the votes of the shareholders.

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The other directors, and the company also, answered to the same effect.

Statement.

Upon these answers coming in, a motion was made for an order directing *Paterson* to pay into court the several sums admitted to have been loaned, and also the sum of £350, made use of by *Paterson*, together with interest, &c., or that he might be ordered to pay in £2351, the sum charged against him in the books; and that *Paterson*, and the other directors, should be ordered to pay the costs of the application.

On the motion coming on—*Mr. Adam Wilson* and *Mr. R. J. Turner* for the plaintiffs.—We contend, that as the defendants admit that the sum of £2351 15s. 3d. of the corporation funds have been lent by the president, and has not been called in, but permitted to remain out by the other defendants, jointly with *Paterson*, while they were directors and had the power to call it in; and as they have, while in office, adopted these loans as proper acts, that they are individually responsible for this sum, and that they should be either ordered to bring it into court, or otherwise to appropriate it according to their duty and the statutes.

Several objections, we understand, are to be urged by the other side: 1st. That the Attorney-General ought to have been made a party;

2ndly. That the company should have been made plaintiffs instead of defendants;

3rdly. That as the company is carried on by vote of the majority, we, the minority, cannot be heard to say that they have acted improperly; and

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4thly. That the proceeding by mandamus would have been the more proper course.

The several acts mentioned in the statement of the pleadings, were referred to and commented on.

The statute 9 Vic., ch. 85, makes express provision as to how the funds of the company shall be appropriated, namely, deposited in one of the banks; and it is under this act, principally, that we proceed; and one main ground for our proceeding is, that we contend that the directors are using the funds of the company in a manner not authorised by the act of incorporation, or by the act of 9 Victoria.

It is alleged by the bill, and admitted by the answers, that *Paterson*, who is president of the company, had loaned out large sums of the moneys of the company, and that one sum of £350 remained in his hands, and which has been applied to his own use. It is only necessary to read the several statutes relating to this company, to perceive that this is an improper use of the funds. Such conduct is subversive of the whole scope and purport of the act, which is for the construction of a canal, and not to constitute the defendants bankers, in which capacity they would appear to have acted.

Statement.

Jefferys v. Gurr, (a) was cited to shew, that where persons in the situation of the defendants have paid moneys over wrongfully, they will be ordered to bring them into court, and that they may proceed at law for recovering back those moneys.

We do not wish the court to distribute the moneys; all that we desire is, that the amount may be brought into court, in order that it may see that the fund is not applied illegally.

It is submitted, that the Attorney-General is not a necessary party. The only object in having him here would be, that he might see that the public interests were properly protected; but surely the fact of one or more stockholders coming forward and filing a bill for the proper application of the funds, is quite as sure a mode of having those funds

1849. properly applied, as if the Attorney-General were here on the part of the public.—*Scarr v. Trinity College.* (a) In *Bromley v. Smith*, (b) it is stated that where all are parties to the abuse, in that case the Attorney-General must act.

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The proceeding here is as much for the benefit of the Crown as of the stockholders, therefore the Attorney-General is not a necessary party.—*MacMahon v. Upton*, (c) *Franco v. Franco*, (d) and *Poore v. Clark*, (e) were cited on this branch of the argument.

As to the second and third objections, the corporation being managed by a majority of the body of directors, and their conduct having been approved of, and their acts affirmed by a majority of the stockholders, the company could only be made defendants. They are wrong-doers, and could not with propriety have been made plaintiffs. *Mozley v. Alston*, (f) *Lord v. Copper Miners Company*, (g) *Bagshaw v. E. U. R. Company.* (h)

Statement.

The acts of the directors having been illegal, no affirmation of them by the stockholders can give them validity. In *Preston v. The Grand Dock Collier Co.*, (i) the company were unanimous; but afterwards, one only dissented and filed a bill, and such bill was sustained. On these points, several cases were cited; amongst them—*Cohen v. Wilkinson*, (j) *Applerly v. Page*, (k) *Cooper v. Webb*, (l) *Walworth v. Holt*, (m) *Foss v. Harbottle*, (n) *Attorney-General v. Wilson*, (o) *Ex parte Lacey*, (p) *Ex parte Thwaites.* (q)

As to the fourth ground of objection, we submit, the proceeding by mandamus lies only when there is a right in plaintiff, and no legal or equitable means of enforcing it. No case can be shewn where a mandamus has been granted to compel a party to render accounts to the court of common law. No doubt it would lie to compel the payment of money into court; but here, large profits have been made,

(a) Cambridge, 3 Ansth. 760.

(c) 2 Sim. 473.

(e) 2 Atk. 515.

(g) 12 Jurist, 1059.

(i) 11 Sim. 327.

(k) 10 Jurist, 998.

(l) 11 Jurist, 93, and affirmed on appeal at p. 443.

(m) 4 M. & C. 619.

(o) C. & P. 1.

(q) 1 M. & A. 323.

(b) 1 Sim. 8.

(d) 3 Ves. 75.

(f) 11 Jur. 315, S.C. 1 Phil. 790.

(h) 13 Jurist, 602.

(j) 13 Jurist, 641.

(n) 2 Hare, 461.

(p) 6 Ves. 625.

of those profits, we desire to obtain an account; not for the purpose of obtaining a share, but simply for the purpose of having the amount paid in, and applied according to the provisions of the acts of the legislature. To show the general purposes for which a mandamus issued, reference was made to *The King v. The Nottingham Water Works*, (a) *Rex v. Windham*, (b) *Gray v. Chaplin*, (c) and *Colman v. Eastern Railway Company*. (d)

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On all the facts, as they appear, we submit, that it is shewn that an improper application of the funds has been made; that having shown this, we are entitled to call upon the defendants to account; and the Attorney-General is not a necessary party in any way; that the company must be made parties, and could, under the circumstances here appearing, be made defendants only; and as we desire to ascertain what profits have been made, an account is absolutely necessary, and that for that purpose a mandamus would not have been a proper proceeding.

[*The Chancellor*.—Do I understand you to contend that the mere fact of lending out the funds of the company remaining in hand, is such an illegal transaction that it will give a party a right to come here to have the money paid into court?] Argument.

We submit it is, particularly when it is shown that the loans were made almost entirely to directors of the company; and particularly since the passing of the act 9 Victoria.

Mr. *Burns* and Mr. *Vankoughnet*, for the defendants, referred to and commented on 7 Geo. IV., ch. 18, secs. 17, 18, 19 & 20, and 7 Wm. IV., ch. 5.

By the several acts, the widest discretion is given to the directors as to how they shall apply the moneys of the company in their hands; and the bill does not allege that any money is required to pay for any repairs, or repaying any loan, or that any inconvenience has arisen in consequence of the moneys having been loaned as stated.

We submit that the Attorney-General should have been made a party: the acts provide for loans to be made by government, and that in the event of mismanagement, the government may take possession of the works and receive

(a) 6 A. & E. 355. (b) 1 Cow. 378. (c) 2 S. & S. 267; 13 Jur. 809. (d) 10 Beav. 1.

1849. tolls, &c. The Attorney-General is clearly interested in the question here raised, for an account is prayed of all tolls, &c., and how the same have been applied. Now the statutes direct, that the tolls shall be first applied to the payment of loans made by government, and yet the plaintiffs desire the account of them to be taken in the absence of the Attorney-General.

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The court, by this bill, is required to suspend the functions of the directors ; how then is the court to appoint new directors ?

The plaintiffs should have shown that the money was required for some of the objects pointed out by the statute, if they desire the aid of this court, and even then, we contend, the court would not interfere. If it is contended that the directors have infringed the provisions of that part of the statute directing payment of the debt due to the government—if that were the case, and if the direction of the work is to be changed, then the public would be clearly interested in the result of this cause, therefore the Attorney-General is a necessary party.

Argument.

Here, since the filing of the bill, a new election has taken place, and some of the defendants have been re-elected directors, and *Paterson* again chosen president.

[*The Chancellor*.—If a new election have taken place, and new directors been chosen, does not that remove so much of the prayer of the bill as seeks to restrain the defendants from acting in the management of this corporation, until proper persons have been chosen ?]

That may be so, but we submit that the bill, being originally defective on its own statements, and for want of parties, no new facts that are stated in the answer can possibly remedy the defect.

We also contend, that the company should have been here, not as defendants but as plaintiffs ; for if the statements in the bill amount to a charge of misapplication of the funds of the company, then it is a case where some of the members of a corporation are wronging the whole body, and the corporation is the proper party to complain of the wrong. A few members of a corporation cannot complain against the

corporation; and if the corporation, where some of its officers are acting improperly, refuse to be plaintiffs, in that case the Attorney-General should be the party to file the bill. This is not the case of a joint stock company, where it is permitted for one or more of the members to file a bill against the whole body—*Dummer v. The Corporation of Chippendale*, (a) *Bainbridge v. Burton*, (b) were cited as to point of parties.

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The whole scope of the statute (9 Vic., ch. 85) is clearly to enable the company to borrow £25,000; and the 3rd section, the words of which have been so strongly relied on by the other side, as well as the other clauses of the act, all depend upon the circumstance of the £25,000 being borrowed.

If we are correct in our views respecting the statute, then the money not having been borrowed, all questions under the 3rd section ceases. But if, as contended by the plaintiffs, that, notwithstanding the money has never been raised, the 3rd and 4th sections are in force; then under the 4th it is submitted that the proper course for them to have adopted, was to have applied by mandamus.

Argument.

Mr. *Morphy* for the Desjardins Canal Company, objected that his clients were improperly before the court as defendants.

Mr. *A. Wilson*, in reply. The bill does not call upon the company to bring the money into court, but simply calls upon persons wrongfully holding the moneys of the company to bring them into court; and the company, being before the court as defendants, will receive directions as to what should be done with the funds.

[*The Chancellor*.—Does not the new election raise a great difficulty in your way?]

We submit that we are entitled still to succeed, that having occurred since the bill was filed. The defendants are applying the funds of the corporation in a manner and for purposes not contemplated by the act of incorporation, and the bill discloses sufficient grounds for coming to the court where it asserts the fact of loans having been made. This would be the case if the loans were not subject to any

(a) 14 Ves. 245.

(b) 2 Beav. 539.

1849. animadversion; but while the answer itself discloses to whom and how these loans were made, and that £12,000 for interest alone remain due to the government, it is impossible to sustain such transactions. Nothing can be more objectionable than the mode and manner of the investment of the money, as shewn in the answer; and besides for the sum of £350, admitted to have been used by *Paterson*, there is no security at all, and for the £1,000 there is no security which can be made available, *Paterson* being both the mortgagor and the assignee of the mortgagee.

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16th Nov.—The judgment of the court was delivered by

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THE CHANCELLOR*.—The bill in this case has been filed by *Hamilton* and certain others, *shareholders of the Desjardins Canal Company*, on behalf of themselves and all other shareholders who shall come in and contribute, against the directors of the company, and the company. The bill commences with a statement of an act passed by the legislature of Upper Canada, in the 7th year of the reign of Geo. IV., by which the *Desjardins Canal Company* was incorporated. It then states an act passed in the 9th year of her present Majesty's reign, authorising the said company to raise a further sum of £25,000 for the purpose of completing their works, and in reciting the last mentioned act, it sets forth at length the third clause to which I shall have occasion to refer more particularly by and by. The bill alleges that the company went into operation, and that its works were some time since so far completed as to have become available to the public, and that the revenue derived from tolls has been considerable: that the defendant *Paterson*, had been elected president in 1841, which office he continued to fill up to the time this suit was instituted: that *Paterson*, during the time he so continued president, possessed himself of the books and papers of the company, and received all the moneys payable to the company, and managed its concerns to the exclusion of his co-directors, in

* ESTEN, V. C., having been concerned in the cause while at the bar, gave no judgment.

which course of conduct he persisted up to the filing of the bill in this suit: that during this period he had not only used the moneys of the company in his own private business, but loaned various sums to divers persons, sometimes upon mere personal security, and sometimes upon mortgage, and that on various occasions such loans were made to his co-directors. And amongst these dealings a loan to the Town Council of Dundas is particularly specified. The bill charges that *Paterson* refused to furnish the stockholders with an account of these dealings, although repeatedly required so to do, and especially at a meeting held on the 3rd day of April, 1848, upon which occasion certain resolutions were read to the shareholders by plaintiffs *Hamilton* and *Hatt*, requiring the directors to submit to the shareholders a detailed account of the affairs of the company, and to call a general meeting of the corporation in the month of May following to examine the said accounts, and devise means for the completion of the canal. The bill further charges, that although *Paterson* then promised to comply with those resolutions, he subsequently declined, and that in consequence of such non-compliance, the plaintiffs *Hamilton* and *Hatt* served a notice upon the president and directors, requiring them to call a special meeting of the shareholders on the 15th of January then next, for the purpose of receiving an exact statement of the affairs of the company under the 23rd section of the act of incorporation, which notice was signed by plaintiffs *Hamilton* and *Hatt*, and thirty others, representing a majority of the stockholders: that the president having called the said meeting at Toronto instead of Dundas, the plaintiffs *Hamilton* and *Hatt* attended and protested against its legality, notwithstanding which, the president and directors by means of their own votes, carried a resolution affirming the legality of the meeting, and lastly, that the accounts then submitted were imperfect and fraudulent, and did not furnish the information which it was the duty of the directors to have supplied.

The bill prayed that an account might be taken of all the affairs, transactions, and dealings of the company, or of

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1849. the president and directors, in relation to the said company, since the said *Paterson* had been appointed president thereof as aforesaid; and that an account might in like manner be taken of all moneys of the said company received by them, the said president and directors, defendants hereto, or any or either of them, or any other person or persons, by their or any or either of their orders, or for their or any or either of their uses, or which without their or any or either of their wilful neglect or default might or ought to have been received, and of the application thereof, and what became thereof; together with an account of all profits, gains, benefits and advantages realised, made or received by them, or any or either of them, by means of the use or employment of the moneys of the said company, or otherwise, in relation to the concerns of the said company; and also an account of all mortgages, bills, bonds, notes, and other securities had, received, or taken for the moneys of the said company, and of the moneys due and owing thereon respectively, and that the said defendants, the said president and directors, may, or some one of them may be ordered to pay the same into court by a short day to be named for that purpose, and that the said defendants may be ordered to pay to the said company all moneys received by them, or any or either of them, with interest for the same, and all profits, gains, benefits, and advantages whatever, in any way arising therefrom, and that the said defendants may, and each of them may be restrained by the order and injunction of this honourable court, from receiving any further tolls, rents, profits, or moneys of the said company arising from the said canal or otherwise, and from in any manner meddling or interfering with the affairs of the said company, or the conduct or management thereof, until the election of some fit and proper person or persons, as the president and directors of the said company; and that in the meantime some fit and proper person may be appointed by the court to receive and collect the tolls, rents, profits, and moneys of the said company, and to conduct and manage the said canal, and the affairs of the said company.

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The defendants have put in their answers, wherein they affirm their constant readiness to account as the shareholders should require ; and aver, that the detailed statement of the affairs of the company is contained in the books, which are always open to the inspection of the corporators. They deny that any personal advantage was acquired by the dealings of the president and directors with the funds of the company, and assert that they acted throughout with a view to the interest of the company ; but they at the same time admit that some of the moneys of the company had been retained by the president in his own hands, and that other portions had been loaned to the directors of the company and others, as charged in the bill. The answers disclose the fact, that a new election of directors had taken place between the filing of the bill, and the coming in of the answers ; at which election two of the plaintiffs, *Ewart* and *Hamilton*, had been chosen directors, and that *Paterson* had been re-elected president.

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The defendants deny that the plaintiffs have any equity to institute this suit ; they affirm that the frame of the bill is defective ; that the corporation should be plaintiffs ; and they claim the same advantage as if they had pleaded or demurred.

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Upon the coming in of these answers, the plaintiffs have moved that the defendants be ordered to pay into court the various sums mentioned in the notice of motion ; and they argue, that they are entitled to this relief upon a two-fold ground : first, because, as trustees, the defendants have been guilty of a gross breach of trust, in dealing with the funds of the company in the manner detailed in the bill ; and admitting this by their answers, they must be regarded as confessing the funds to be in their hands ; under which circumstances, the order prayed would, as they argue, be in accordance with the settled practice of this court.

Secondly, because, irrespective of the improper dealings with trust funds charged upon these defendants, the 3rd sec. of the 9th Victoria imperatively requires all the revenue of the company to be deposited in one of the chartered banks, and that this court will assist the shareholders in obliging

1849. the directors to comply with the provisions of the act in question.

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The defendants, on the contrary, insist that the motion must be refused : first, because there is a defect of parties, inasmuch as the Attorney-General should be a co-plaintiff, not only on account of the large sums advanced to the corporation from the revenues of the province, but also in order to represent and guard the interest which the public have in all works of this description ; secondly, because the suit has been improperly constituted, the plaintiffs not having shown by their bill any grounds for suing on behalf of themselves and the other shareholders, and because the company should have been plaintiffs ; thirdly, because an order to pay money into court, under the circumstances of the case, would not only be unprecedented, but highly injurious to the interests of the company.

With respect to the first objection, we think it equally clear, upon reason and authority, that the Attorney-General is not a necessary party to this suit.

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In regard to the last objection, were it necessary now to pronounce an opinion upon that, we feel the utmost difficulty in persuading ourselves that such an order as is asked by this motion could be justified by reason or authority. The plaintiffs have argued throughout as though this were an application by the *cestui que* trust, against his trustee, to bring into court money admitted by the answer ; and no doubt were this such a case, the order, as to some of the amounts at least, would be in accordance with the well understood practice of the court. But the similarity between this case and the one suggested as analogous, is much more in sound than in substance. The prayer of the bill, indeed, asks that this court should appoint a receiver, to manage the affairs of the company, and an injunction to prevent the directors—the defendants in this suit—from all interference ; and had it been competent to this court to grant that relief, an order compelling the payment of the revenue of this company into court might seem more reasonable. But it is too obvious for argument, that the court has no such jurisdiction as that supposed. The prin-

ciple once admitted, where should the line be drawn? This court may possibly find itself the manager of all the public companies in the province. The conduct, therefore, of the affairs of this company must be left with the president and directors; and the practical result of granting this application would be, that a company in full operation under the management of agents of its own appointment—an agency, too, *of necessity* undergoing an annual change by vote of the shareholders, and over whom, in regard to the fiscal affairs of the company, a very efficient control has been given to the corporators by their act of incorporation—such a company, so circumstanced, might find itself under the necessity, for a period, to obtain the funds necessary to meet its ordinary expenditure by a series of applications to a Court of Chancery. Could the company be carried on after such an order? Although it were competent to the court to entertain an application in this form, which, to borrow the language of Lord *Cottenham*, would seem to contemplate the practical dissolution of the company, we feel strongly that such a jurisdiction ought only to be exercised under circumstances of the most pressing necessity, which have not, we think, been established in this case. But if these difficulties would startle one, though the direction remained as it was when this bill was filed, how much are they magnified when we consider that since that period the direction has been changed, two of the present plaintiffs having been elected in the room of two of the defendants? For aught that appears, the great majority of the corporation may now feel that the custody and management of their funds would be much more satisfactory and provident with the present directors, than with the Court of Chancery. We asked repeatedly during the argument, whether any precedent existed for such an order as is prayed by this motion; but the only one to which we have been referred, is the case cited of *Jeffreys v. Gurr*(a); and from the interval which occurred between the opening of this motion and reply, and the industry which has been evinced in col-

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(a) 2 B. & Ad. 833.

1849. lecting authorities upon the subject, we must assume that the case cited is the only direct authority in favour of the motion. We do not consider, however, that the authority referred to ought to govern us upon this occasion; for besides being very special in its nature, it has relation to the administration of a charity—a class of cases in regard to which this court is governed by principles and a practice not applicable to ordinary trusts.

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But although we should have felt great difficulty upon the grounds stated, in ordering the funds of this company into court upon this interlocutory application, we do not find it necessary, upon this occasion, to pronounce our judgment upon that portion of the case, because we are of opinion that this record has not been properly framed, and that the second objection must therefore prevail.

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We are glad that this portion of the case has been so fully and ably argued, and the authorities so carefully collected, not only because the case is in itself important, and the question involved somewhat difficult of solution; but, further, because although the modern decisions are numerous, we have not found any in which the authorities have been fully reviewed, and we have not been able to satisfy ourselves that the views of all the learned judges who have decided those cases can be reconciled.

The bill in this case has been filed by the plaintiffs on behalf of themselves and all the other shareholders except the defendants, (the then directors,) against the then directors and the company; and it complains of a disposition of the entire funds of the company, in a manner which this court does not permit in trustees, and therefore to be *remedied*; or at all events contrary to the 9th Victoria, ch. 85, and therefore to be *prevented*. I call attention again to the two-fold ground upon which the plaintiffs found their case, because, although much of the reasoning upon which we rest our judgment will be found to apply to both grounds, yet some portion of it is exclusively applicable to the former, and we are anxious that the principles upon which we proceed should be clearly announced. The bill complains of a disposition of the entire revenue of the Desjardins Canal Com-


pany. Here is no distinct interest in one class of the corporators against another. The course pursued is an injury to the entire body, of which the company itself would seem the natural complainant; but should any good cause be shewn for not making the company plaintiffs, still the present complainants would be under the necessity of proving the correctness of the form used in this bill, which is not in accordance with the general rules of the court. In answer to arguments of this nature urged by the defendants, the plaintiffs' counsel contend, as we apprehend them, that the acts complained against, are the acts of the entire body of directors, and, as such, are the acts of the company; and consequently the company could not appear as complainants upon this record. We heard nothing to convince us that upon the pleadings, as framed, the plaintiffs have a right to sue on behalf of absent parties. The argument of the complainants' counsel seems to us to involve a double fallacy: first, in order to prove the suit rightly constituted, it treats the company and its directors as so completely identified, that the former cannot, *as a company*, complain of the acts of the latter; and yet, for the purpose of relief, it so completely severs the company from the directors, that it expects this court to make a decree against the latter, without any thing alleged or proved to shew us that the majority of corporators concur in asking such relief; the complainants in this bill assuming to themselves the right to represent the body of shareholders. We hold both opinions to be erroneous. We think that the corporators may, under circumstances, use the company's name in complaining of the acts of its own directors; and we are further of opinion that in those cases where, owing to circumstances, the company's name cannot be used, yet, plaintiffs assuming to sue in the form used in this bill, must, in order to entitle themselves to adopt such a course, shew that the majority of corporators concur—except, indeed, where the act complained of is plainly illegal, and so incapable of confirmation.

Before stating the reasons and authorities upon which our opinion has been grounded, we would mention, that the plaintiffs have not shewn upon the record any title to insti-

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 tute these proceedings. In the title of the bill, they are indeed described as shareholders; but that fact is no where distinctly alleged, and the court, consequently, is not informed whether they claim as original shareholders, or as assignees of such; and if as assignees, whether the requirements of the statute have been complied with. In this point of view, *Walburn v. Ingilby*, (a) and *Banks v. Parker*, (b) would seem authorities against the bill. We forbear, however, to give our opinion on this part of the case; because the point was not taken, so far as we recollect, and consequently has not been discussed.

Judgment. We are of opinion, that nothing appears upon the face of this record sufficient to warrant the court in entertaining a suit by the plaintiffs, *on behalf of themselves* and all the other corporators, instead of having all the shareholders made complainants, according to ordinary practice. The introduction of this form of pleading is of comparatively modern date. Not very long since, this bill would have seemed clearly demurrable. The existence of numerous joint stock companies, consisting of a great number of proprietors, would perhaps have rendered its adoption necessary in England, though it had been less sustainable on principle than it really is. Lord *Cottenham*, however, in his judgment in *Walworth v. Holt*, (c) has justified it, not only upon necessity, but also upon principle; and since that case, it has been in very general use—so much so indeed, that it now seldom forms a subject of discussion; and from the absence of comment, a superficial reading of the cases might lead one to conclude that it would be competent to a complainant to adopt this form, without reference to the particular circumstances of his case. It is obvious, however, that this is not so, and that a complainant must follow the established practice, in bringing before the court all the persons on whose behalf the bill has been filed, unless, upon the record, he brings himself within the exception. Although the practice has now become so well established, and the rules which govern it so well observed, that it has been for the most part withdrawn from discussion, yet its existence may

(a) 1 M. & K. 61.

(b) 16 Sim. 176.

(c) 4 M. & C. 619.

be clearly traced even through the cases cited for the plaintiffs. The appropriate allegations are to be found scattered through the reports of most of the cases, but, probably owing to the point there decided, stand out prominently in *Holland v. Baker* (a).

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The principle thus established with regard to joint stock companies is, we think, equally applicable to the case of a corporation, where the corporators are obliged to come in their individual capacity, instead of using the name of the company. The cases cited fully evince this; but they also establish that corporators, in using the forms thus allowed *ex necessitate*, as it were, must conform to all the rules required in respect to joint stock companies. We are of opinion, that this record does not allege those circumstances which must exist to entitle the plaintiff to sue in this form. The whole stock of the company amounts to but £6500, yet we are no where informed what the number of the corporators is, or, in truth, whether any reason exist for not bringing them all before the court.

But before the plaintiffs can raise the question, whether they can sue here on behalf of themselves and the other corporators, we are of opinion that they are bound to establish another point preliminary to this, namely, why the company itself has not been made the party complainant. A departure from the ordinary practice is permitted with regard to joint stock companies, *because they have no corporate character*; and if this principle of representation were not permitted, justice would inevitably be denied when the society consisted of numerous persons. This principle has been extended to corporations *where the corporators are obliged to come in their individual capacity*; but upon reason and authority, they are confined to the excepted case. They must not only shew that their number, &c., warrant the adoption of the principle of representation, as is required with regard to joint stock companies, but they must go one step further, and shew why they do not sue in the character with which they have been

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(a) 3 Hare, 68; see also *Deeks v. Stanhope*, 14 Sim. 57.

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1849. clothed by their charter or act of incorporation. If a party will not be allowed to sue on behalf of others without bringing himself within the exceptions, where those others have no corporate character in which they can present their case, *a fortiori*, such a departure will not be permitted in regard to shareholders who have been clothed with a corporate character, and may therefore, unless the contrary be shewn, bring their case before the court without the infringement of any settled rule. In deciding that the shareholders in an incorporated company cannot sue in the form adopted in this case, except upon reason shewn, we of course affirm their right to use the name of the company. We, in fact, distinguish between the members of the company and the directors; we regard the directors as the agents of the company, and where their acts are illegal, fraudulent, or unauthorised, we think that the corporation have a right, like any ordinary individual, to institute proceedings against their agents to correct such abuse. And in coming to this conclusion, we conceive that we infringe no rule of law, but announce a proposition well founded both in reason and on authority. Suppose a charter of incorporation should give to the body of the corporators a right to control the directors, either in all matters committed to their management, or with respect to some particular branch of their duty. Can it be doubted that in such a case the directors would be the mere agents of the body of corporators? Can it be doubted that they would be entitled, in the corporate name, to impeach such acts of their agents? And is it not equally clear that, where the charter of incorporation is silent, the body of corporators must have such power to impeach the fraudulent or illegal acts of their agents? In all matters *left to the discretion* of the directors, upon which they have fairly exercised their judgment, *their* acts would be the acts of the company, and the corporators would be precluded from using the corporate name; but then such acts would be on the hypothesis unimpeachable; no suit could be instituted to reverse them. We shall presently refer to other arguments, upon which we ground our judgment. But as those already advanced apply to those acts

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of the directors of a corporation which are illegal, and so absolutely void, as well as to those which are only voidable, while the remaining considerations apply especially to such acts as are only *voidable*, and so capable of confirmation by the body of corporators, we think it will be more convenient to refer to the authorities before passing on to those other considerations.

In the *Attorney-General v. Wilson*, (a) the information and bill were filed by the Attorney-General, at the information of the Mayor and Burgesses of Leeds, *and the Mayor and Burgesses of Leeds*, plaintiffs, and the former directors, defendants. In that case, the Mayor and Burgesses of Leeds had accumulated a considerable sum, principally the product of fines imposed upon each other, and being desirous that those funds should not fall into the hands of such Mayor and Burgesses as might be elected after the passage of the Reform Bill, they disposed of the entire fund to the clergy and different charitable institutions in Leeds. The bill and information was filed to set aside these transactions. It was argued that it was competent to the governing body to dispose of those funds as they might see fit: that the acts of the mayor and burgesses were the acts of the whole body, and that therefore the corporation could not be heard to impeach its own acts. In combating this argument, Lord *Cottenham* said: "The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interest and property; and if such agents exercise those functions for the purpose of injuring its interests and alienating its property, shall the corporation be estopped in this court from complaining, because the act done was ostensibly an act of the corporation?" And again, "I think both objections are founded upon the same error, namely, that of confounding the *legitimate* acts of the corporation with unauthorised acts, effected by members or agents of the corporation in the name of the corporation. Of these the

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1849. *corporation* may complain, and may have redress against such members or agents as are the authors of the wrong. No doubt could be entertained of the right of the corporation to redress, against its agents. Can it be that no redress can be had against the author of the wrong, because he was a member of the corporation, and effected it by an abuse of that power which that situation gave him?"

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In that case, it will be perceived that the act complained of had not been forbidden by the charter of incorporation. No power in respect to it had been vested in the corporators. But it was *illegal*, destructive of the corporate property, which it was the especial duty of the agents of the company, the Mayor and Burgesses, to protect. It may be argued, however, that in the case just cited the defendants had ceased to be connected with the corporation; new directors, so to speak, had been elected, and so the corporation of Leeds, Mayor, Burgesses, and Corporators were all plaintiffs in the suit in question. We are of opinion that this distinction is not well founded. If the Mayor and Burgesses of Leeds of to-day, can be heard to impeach the acts of the Mayor and Burgesses of yesterday, it can only be by drawing a distinction between the governing body and the corporators, when the acts complained of are illegal. And if such distinction may be drawn when the direction has been changed, so it may, we think, although the same directors should continue in office. The company, in the sense which I now use that term, must have power to restrain the contemplated illegal acts of its agents, as well as to remedy them when accomplished. But this can only be effected by drawing the distinction pointed out, and allowing the company to institute proceedings against its agents, even during their continuance in office.

In the *Exeter and Crediton Railroad Company v. Buller*, (a) the company was incorporated by act of parliament, for the purpose of constructing a particular line of railroad. Both before and subsequent to the incorporation, the corporators, as well as the directors of this company, con-

templated a lease of their work when completed to the Great Western Company. But, as the work advanced, difficulties arose, and the majority of the shareholders at length came to a resolution, that they would not lease the road to the Great Western, but to the Torr Vale Company. The directors, however, were exceedingly anxious to carry out the original arrangement; and with a view, as alleged, of coercing the corporators, were proceeding to construct the work with the broad guage, which would in fact have obliged the company to carry out its contract with the Great Western, inasmuch as the Torr Vale Railroad, having been constructed with the narrow guage, could not have used the Exeter and Crediton Road, if completed as at first designed. Under these circumstances the corporators filed a bill in the name of the company against the directors, and contrary to their wishes. A motion was made to take the bill off the file, not having been authorised by the directors. It was argued that there was no authority to file the bill, and no retainer under the seal of the corporation. Sir *Launcelot Shadwell*, in delivering judgment, said: "that the company had a right to do it (file the bill) in the abstract, cannot, I think, be doubted." And in a subsequent part he says: "it is an extremely difficult thing to do justice to what is called a company, if you are to consider a company as a sort of metaphysical thing, and, according to the description of my Lord *Coke*, having neither body nor soul, and unless you really say that the company must be taken to be identified with the majority of shareholders who constitute the company." And it being urged that the corporators had never passed any resolution authorising the filing of this bill, his honour ordered the motion to stand for eight weeks, in order to allow the corporation time to come to some resolution on the subject. This motion was renewed before Lord *Cottenham* upon appeal, upon the same arguments urged before the Vice-Chancellor; and in the course of his judgment his lordship observed: (a) "it is, however, said that there is no seal affixed, and that there is no retainer for filing the bill;

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(a) 11 Jurist. 527.

1849. but though this is so there is a resolution which could be carried into effect by no other mode than filing a bill. *If filing a bill was necessary to prevent the directors from doing what they contemplated, the resolution gave power to file the bill,*" (speaking of the resolution to lease to the Torr Vale Company.) "The question, therefore, is whether, when representation is made by the defendants, stating that they are the corporation, and seeking to stay the proceedings, am I to interfere, without giving the corporation an opportunity of stating whether they assent or not to the proceeding? *In doing so, I should not only be creating a great difficulty, and doing an act of injustice, but I should be laying down a very absurd rule.*"

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We are of opinion, therefore, both upon reason and authority, that the majority of the shareholders in an incorporated company have a right to use the corporate name, in a suit instituted for the purpose of impeaching the acts of its directors, when those acts are either illegal, unauthorised or fraudulent. And we are further of opinion, that having such right, they are bound to adopt that course, unless indeed the majority of the corporators refuse to lend their sanction, or unless no means exist of ascertaining the wish of such majority. In either of these events, it would be competent to the corporators to sue in their individual capacity; but then they would be bound to disclose upon the record the circumstances which necessitated the departure from the ordinary mode of proceeding.

But if our opinion be well founded, where the act impeached is illegal and so absolutely *void*, the argument is a *fortiori* where it is only *voidable*. In the former case, the objection resolves itself into one of form. It does not affect the equity of the plaintiffs. They may have a right to come to the court for relief; but before divesting themselves of their corporate character, and suing in their individual capacity, they must shew that no means existed of setting the corporation in motion; and having failed to do so, the court cannot entertain their application. But in the latter case, the objection is not only one of form, but also of substance. For upon what principle could this court permit a

corporator to sue, on behalf of himself and others, to impeach *voidable* acts of the directors? It is too apparent for argument, that at the moment the Court of Chancery is pronouncing its judgment in favour of the plaintiff's claim, the majority of the shareholders may be engaged in resolving, and that too conclusively, that the dealings complained of ought not to be disturbed. The objection here is one of substance. The power to affirm or disaffirm *voidable* acts is with the *cestuis que trustent*, the majority of the corporators. If the majority elect to *affirm*, then the plaintiffs, who upon such hypothesis would represent the minority, have no equity. The conclusion is inevitable. Corporators who seek to be relieved from voidable acts of their directors, must first attempt to put the corporation itself in motion. They must ascertain the will of the majority. If that majority elects to disaffirm the acts, it has a right to make use of the corporate name in seeking redress, and is bound to do so. If, on the other hand, it elects to affirm such dealings, no suit indeed can be instituted in the corporate name; but neither should there. The minority have no right to take such a step. We do not mean to lay down this as an inflexible rule. It has its exceptions. But the plaintiff in that case must shew upon the record why he claims to sue in a way unauthorised by the general practice of the court.

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The principles of reason upon which we found our judgment seem to us fully recognised in decided cases. In *Foss v. Harbottle*, (a) the bill was filed by several persons, on behalf of themselves and all other shareholders of the Victoria Park Company except the defendants (the directors) against the directors. The facts of the case are voluminous and complicated; but it will be sufficient for our present purpose to remark that the company had been incorporated for the constructing a public park in Manchester; that the bill disclosed a series of the most flagrant frauds, by which the defendants, after the company had been projected, had purchased up the lands designed for the park, with a view to their subsequent sale to the company at greatly increased prices; that they had procured

(a) 2 Hare, 461.

1849. themselves to be elected directors, and had then purchased from themselves for the company these same lands at a large profit; that the funds of the company, not sufficing to pay the purchase money, the directors proceeded to mortgage the lands of the company, for the purpose of raising the requisite funds; and that, although the capital expressly required by the statute had not been subscribed. The plaintiffs in this bill sought to escape from the general rule (according to which the company ought to have been plaintiffs) by an allegation that no mode existed of putting the corporation, as a corporation, in motion, inasmuch as the only mode of calling a general meeting was by means of a notice served upon the directors; and as that body had, by death or otherwise, been reduced below the limited number, there existed in fact no body of directors upon whom notice could be served. Upon these and other grounds, which I need not now enumerate, the plaintiffs sought to establish the right to sue in the form adopted. It will be seen that the acts complained of in that case, (as in the one now before the court,) were in part voidable, because, although fraudulent and improper in trustees, still capable of confirmation by the *cestuis que trustent*, the majority of the corporators; others were altogether void, as contrary to the express provisions of the act of incorporation; and Sir *James Wigram*, in his judgment, keeps these two classes distinct. The judgment is a very luminous one, and in many parts will be found to have a very strong bearing upon this case; but we shall confine ourselves to a passage or two, which seem to us decisive of the question, if the case cited is to be regarded as law. In arguing with regard to the voidable acts, the learned judge, at page 494, says, "Whilst the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of the proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact, that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the

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frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shewn either that there is no such power as I have supposed remaining in the proprietors, *or at least that all means have been resorted to and found ineffectual, to set the body in motion.* This latter point is nowhere suggested in the bill. There is no suggestion that an attempt has been made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if these transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights."

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A little further on, at page 497, he remarks: "At all events, what is there to prevent the corporators from suing in the name of the corporation? It cannot be contended that the body of proprietors have not sufficient interest in these questions to institute a suit in the name of the corporation."

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And again, at page 499: "There is no longer the impediment to convening a meeting of the proprietors, *who by their vote, might direct proceedings like the present, in the name of the corporation, or of a treasurer of the corporation (if that were necessary), or who, by rejecting such a proposal, would in effect decide that the corporation was not aggrieved by the transactions in question.*"

And in disposing of those acts objected to as illegal, and so totally void, and incapable of confirmation by the directors, the learned judge observes, at page 504, "The second point which relates to the charges and incumbrances alleged to have been illegally made on the property of the company, is open to the reasoning which I have applied to the first point upon the question—whether, in the present case, individual members are at liberty to complain in the form adopted by this bill; for why should this anomalous

1849. form of suit be resorted to, if the powers of the corporation may be called into exercise?"

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This decision, if it stood alone, would seem to us conclusive of the whole case, being an authority in point, and, we think, well founded in reason. But having reference to the observations of Vice-Chancellor *Knight Bruce*, in a very recent case—*Cooper v. The Shropshire Union Railway Company*, (a)—which would seem to throw doubt upon all the preceding decisions, and keeping in view the contrariety, or apparent contrariety, to be found in some of the judgments, we feel it due to the plaintiffs to consider further some of the cases cited.

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Mozeley v. Alston, (b) was a bill filed by two corporators, in the Birmingham and Oxford Grand Junction Railway Company, against the directors *de facto*, and the company itself. The statements in this, as in most of the cases cited, are extremely voluminous; but it may be sufficient for our present purpose to state, that the bill alleged an improper intention on the part of the directors, to amalgamate the Birmingham and Oxford Company with the Birmingham, Wolverhampton and Dudley Company, and to sell both to the Great Western Company. That the great majority of the proprietors disapproved of this intention; but that the directors, with a view of defeating the wishes of the proprietary, had refused to ballot out four of their number, as provided by their act of incorporation, and were at the time of filing the bill illegally executing the office of directors, with a view of accomplishing the sale I have mentioned. I was myself present at the argument of this cause, before the Vice-Chancellor of England. It occupied very many days. And certainly, if patient investigation and great ability could ensure a sound decision, this case ought to afford a safe precedent. Having been so fully discussed, and decided too upon appeal, we regard it as of the highest authority. After disposing of the first point—that the plaintiffs could not sue, as they had done, in their individual names—the learned judge proceeds to consider what would have been the effect had they sued on behalf

(a) 18 Jurist, 443.

(b) 1 Phil. 790.

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of themselves, and all the other shareholders of the company. He says at page 799, "The complaint against the defendants is, that they are *illegally exercising* the powers of directors, and *illegally retaining* the seal and property of the company. That, if it be an injury at all, is an injury not to the plaintiffs personally, but to the corporation of which they are members. A usurpation of the office of directors, and therefore an invasion of the rights of the corporation; and yet no reason is assigned by the bill why the corporation does not put itself in motion to seek a remedy. And then, after citing the judgment of Sir James Wigram, in *Foss v. Harbottle*, he says, page 800, "The same observation applies with still greater force to the present case, for not only does it not appear that the plaintiffs have no means of putting the corporation in motion, but the bill expressly alleges that a large majority of the shareholders are of the same opinion with them; and if that be so, there is obviously nothing to prevent the company from filing a bill in its corporate capacity to remedy the evil complained of. Such a bill would be free from the objection to which I have referred as existing in this case, for it would be a bill by a body legally authorised to represent the interest of the shareholders generally; but to allow, under such circumstances, a bill to be filed by some shareholders, on behalf of themselves and others, would be to admit a form of pleading which was originally introduced on the ground of *necessity alone*, to a case in which it is obvious that no such necessity exists." But we have been referred to *Preston v. Grand Collier Dock Company*, (a) and *Bagshawe v. Eastern Railway Company*, (b) as direct precedents for the bill in this present case. *Preston v. The Dock Company* was decided in 1840, while the case we have just quoted from was determined in 1847, and upon appeal to the Lord Chancellor; if, therefore, any contrariety should be found to exist, we apprehend that the older case before the Vice-Chancellor must be considered as overruled. But we do in fact find no such contrariety as might at first sight appear. The conflict in the case in Simons was not between the

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(a) 11 Sim. 327.

(b) 13 Jurist, 602.

1849. proprietors and the directors, but between two classes of corporators; the one asserting that it should not be bound by having subscribed for a considerable amount of stock, for the purpose of satisfying the orders of the House of Lords, the other contending that such a subscription should be held binding, and that the class of persons so subscribing should be compelled to pay calls *pari passu* with the general shareholders. Such a case is plainly distinguishable from the one now under consideration. We do not in fact see how the record could have been otherwise framed; and when this case was cited to Sir *James Wigram* in the argument of *Foss v. Harbottle*, he distinguished it upon the grounds we have just mentioned. The plaintiff's counsel, however, relied with great confidence upon the latter case, (*Bagshawe v. The Eastern Railway Company*,) as one of recent occurrence and directly in point. We should have been much surprised to find any thing decided by Sir *James Wigram* overruling his own luminous judgment in *Foss v. Harbottle*, which had been repeatedly cited by the Lord Chancellor with approbation. But upon examination *Bagshawe v. The Eastern Union Railway Company* will be found to be in no degree parallel with the case in *Hare*, or that now before this court. The bill was filed in that case by the plaintiff, not on behalf of himself and all the shareholders in the Eastern Railway Company, but by himself, on behalf of the owners of certain scrip issued by the company under several acts of parliament, for the purpose of raising a sum designed to construct branch roads. The stock of the Eastern Union Company amounted to £7,000,000, while the sum represented by the plaintiff, and those on whose behalf he claimed to sue, amounted to but £300,000. The plaintiffs, if shareholders at all, as in our judgment they were not, could have had no right to use the company's name, for they were in direct conflict with the great mass of the shareholders, in fact the whole proprietary of the Eastern Union Railway Company. In that respect it has a resemblance to *Preston and the Dock Company*, though possibly less questionable—we do not see how the record could have been otherwise framed. But it

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certainly affords no precedent for the form of pleading adopted in the case under our consideration. 1849.

Two decisions of the Master of the Rolls have been cited to us—*Coleman v. Eastern Counties Railway Company*, (a) and *Cohen v. Wilkinson*, (b)—which do not seem so plainly reconcilable with Lord *Cottenham's* judgments. But, as we before remarked, though cases should be found in direct opposition to those upon which we rely, we should hold ourselves bound by clear declaration of law, pronounced by the Lord Chancellor upon appeal, the more especially as those decisions appear to us borne out by reason. But we are not prepared to admit that there exists, even in those cases, a conflict of authority. They are both of a very special nature, particularly that in the *Jurist*; and the defendants seem to have relied much more upon the want of equity than upon the defective form of the record. Indeed, in the latter case the demurrer was only for want of equity. We may observe, too, in passing, that these reports in the *Jurist* would seem to be produced with too much rapidity to allow of that careful statement of the facts and arguments in the cause, requisite to enable those at a distance (and so unaware of much which persons on the spot can without difficulty ascertain) to form a correct estimate of the whole bearing of the case. Take, as an example of the observation, the case cited in the argument—*Lord v. The Copper Miners Company* (c)—and contrast that report with the case in 2 *Phillips*, 740, and one cannot fail to observe how much is to be found in *Phillips* necessary to the elucidation of the judgment, which has been altogether omitted in the *Jurist*.

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Upon the whole case, considering the great difficulties in the way of the plaintiffs' eventual recovery upon this record, as at present framed; the absence of any allegation of title; the absence of any averment, warranting the plaintiffs to sue on behalf of the other corporators; the absence of all reason why the company has not been made complainants; and when we superadd to all these the hesitation which we should feel in ordering this money into court, even though

(a) 10 Beav. 1.

(b) 13 Jurist, 641.

(c) 12 Jurist, 1059.

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1849. the record were correct in form, we feel that were our opinion even much more doubtful than it is, we should exercise a most unwise discretion in placing the funds of this company in court, upon this interlocutory motion.

Upon the other points of the case, we need not express an opinion ; but we feel it right to say, that they seem to us to oppose serious obstacles to the plaintiffs' recovery in this suit.

Motion refused—Costs reserved.

THE ATTORNEY-GENERAL V. McLAUGHLIN.

Practice—Injunction—Rights of riparian proprietors.

Nov. 13 & 30. An averment that the soil of a stream is vested in the Crown does not import that the Crown has therefore any power to interfere with the rights of riparian proprietors.

There are many cases in which the court will interfere by injunction to maintain things in *statu quo*, *pendente lite*, not only where the title of the plaintiff to relief is unquestioned, but even where that title is doubtful ; provided the court sees that there is a substantial question to be settled. But the court does not interfere by special injunction against a party in possession claiming adversely to the plaintiff ; nor, on the other hand, will the court, as a general rule, so interfere in favour of a party in possession, to restrain a casual trespass.

On an application on behalf of the Crown for a special injunction, it appeared that the acts and threats complained of occurred eight and eleven months before the filing of the bill, and the motion for the injunction was made twelve months after the answer came in. *Held*, that the application was too late.

The facts of the case, so far as respects the present motion, Statement. are set forth fully in the judgment of the court.

Mr. *A. Wilson*, and Mr. *C. Cooper*, for plaintiff.—The information alleges, and the answer admits, certain acts to have been done by the defendant in the months of October and November, 1846, and February, 1847, to the public works on that part of the Ottawa river called “the Chaudiere Slides,” which the plaintiff asserts were injurious to the works.

The defendant attempts to justify his acts, because he says he has been refused remuneration by the Executive Council for damage which he alleges he has sustained by the construction of those works ; and because the rubbish thrown by him into the channel of the river does not, as he says, do injury to the works, and because he has, as he asserts, a right to use the water of the river, without the interference, which he says, these works have created.

We conceive that the acts in question, if not justified, are injurious to the public works, and cause an injury of that description which calls for the protection of an injunction; and we submit, that none of the grounds relied upon by the defendant can be held to be a justification of his conduct.

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The refusal by the Executive Council to grant him remuneration, cannot possibly warrant the acts charged against him, if he have no right independently of that refusal; and besides this, the Council was not the place for him to seek relief; because the act 11 Victoria, ch. 24, and the preceding acts of that description, had established a tribunal before which he could have asserted his title to recompense upon the ground of a right.

We also submit, that although the defendant deny the rubbish which he has thrown into the river to have caused any injury to the works, yet, inasmuch as he has admitted the fact of having thrown the rubbish into the channel, that the plaintiff is entitled to the injunction; because the act of filling up the channel is an illegal act, and apart from the question of damage, will warrant the issuing of an injunction. But at any rate, as the act is illegal, and the information asserts that it has been detrimental, the injunction might go with propriety till the fact of damage can be ascertained.

We then contend, that the acts of the defendant, committed in the fall of 1846, and the spring of 1847, must be illegal; because the title to these works, and the right to have the stream to be so used as to be subordinate to the proper maintenance and use of these works, is vested in the Crown for the benefit of the public by the act 9 Victoria, ch. 37; and, if it were necessary to be shown, it also appears that the public works are now in the same state that they were in when they were finished in the spring of 1846. It is true, the information does not refer to that statute as giving title to the Crown; but it is submitted, that the court will judicially notice the act, although it be not pleaded. The acts are also against the covenant of *Frith*, which binds the defendant as assignee.

Amongst the cases cited were—*Robinson v. Lord Byron*,
(a) *Earl Bathurst v. Burden*. (b)

(a) 1 Bro. C. C. 587.

(b) 2 Bro. C. C. 63.

1849. Earl Cowper v. Baker, (a) Storer v. Great Western Railway Company, (b) Franklyn v. Tuton, (c) Flint v. Brandon, (d) *Jeremy's Eq. Jur.* 327.
 Attor'y-Gen. v. M'Laughlin.

Mr. Mowat for defendant.—The acts complained of in the information are mere common trespasses, and not a proper foundation for a special injunction.—*Mogg v. Mogg*, (e) *Mortimer v. Cottrell*, (f) *Courthope v. Maplesden*, (g) *Deere v. Guest*. (h)

The defendant's conduct is no breach of the covenant set out. He has not interfered with any government works "on the demised premises;" and to these the covenant is expressly confined. The government had no right to erect slides to impede the navigation of the river, or to interfere with the mills thereon.—*Attorney-General v. Richards*. (i) It also appears from the answer, that the defendant, and those through whom he claims, have used the water for their mills for twenty years. Their right to the water is also implied in, and goes with, the defendant's property, as appurtenant under the lease from the government, by its officers. This court, at all events, will not interfere in a case like the present without a trial at law being first had. This should have taken place long ago,—*Earl of Ripon v. Hobart*, (j) *Attorney-General v. Johnson*, (k) *Attorney-General v. Cleaver*, (l) *Birmingham Canal Company v. Lloyd*, (m) *Crowder v. Tinkler*. (n) This information has been filed, and the present application is made, far too long after the commission of the acts complained of, to entitle the Attorney-General to a special injunction now.

30th November.—The judgment of the court was delivered by

THE CHANCELLOR.—The information in this case was filed on the 22nd of October, 1847. It states that the broken front of lot No. 40, in the township of Nepean, was in the

(a) 17 Ves. 128.

(c) 5 Mad. 469.

(e) Dick. 670.

(g) 10 Ves. 289.

(i) 2 Ans. 603.

(k) 2 Wils. ch. 87.

(m) 18 Ves. 515.

(b) 6 Jurist, 1009.

(d) 8 Ves. 159.

(f) 2 Cox. 205.

(h) 1 M. & C. 516.

(j) Cooper Temp. Brougham, 333.

(l) 18 Ves. 210.

(n) 19 Ves. 617.

year 1809 granted by his then Majesty to one *Randall*, in fee simple: that the said parcel of land, by several mesne assignments, became vested in one *Sherwood* in fee, who in the year 1829 conveyed one acre thereof to his then Majesty in fee; and the aforesaid parcel of land was acquired by his Majesty under the provisions of an act of the parliament of Upper Canada, authorising the construction of the Rideau Canal, and that the consideration for the same was paid out of "public funds:" that upon the day of the execution of the last mentioned conveyance, one *John By*, an officer in his Majesty's service, then engaged in the construction of the said work, demised the said acre of land to one *Frith*, for thirty years; and in consideration of expenditure already incurred by the said lessee in the erection of mills upon the said premises, the said *By* agreed to forego the stipulated rent for a period of fifteen years. The indenture of lease first referred to, contained covenants on the part of the lessee which have been set out in the information, as evincing the right of the Crown to the relief now asked, to which we shall not now further allude, as it will be necessary to refer to them more particularly by and by. It appears that all the interest of *Frith* in the demised premises has been assigned to the defendant, who has been for some time, and now is in possession of the same. The information further states that the soil of the river Ottawa is vested in her Majesty, in right of her crown, as is also the land on both banks, and both above and below the broken front of lot 40: that large quantities of timber are annually floated down the river Ottawa; and that in consequence of obstruction in that part opposite lot 40, various slides had been constructed by government, several years before the filing of the information, along the course of the Chaudiere rapids, to facilitate the passage of timber, which was subjected to a toll for the use of such works; and that such toll constituted part of the revenues of the province: that such works had not *materially* interfered with the natural flow of the stream, or prevented the efficient working of the mills of defendant: that in the month of *October*, 1846, the defendant had deposited, or rather allowed to accumulate

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1849. from his saw mill, between his mill dam and the edge of the slide, a pile, consisting of saw dust, planks and pine bark: that one *Graham*, on the part of the government, had desired the defendant, on the 21st of November, 1846, to remove the said obstruction, but that he had refused to comply, asserting "an equal right with the government to the use of the channel in question. And the information alleges, that should the obstruction be allowed to remain, "*and should other piles and heaps be placed in the said channel, and suffered to remain, the operation of the said slide would be greatly obstructed* ; that on the same 21st of November, 1846, the engineer in charge of the works had caused certain stop logs to be placed at a point designated on the map as A, for the purpose of shutting off the water, in order to repair the slides: that the defendant had removed those logs, or some of them, *in consequence of which the repairs have been delayed some hours*: that on the 22nd day of February, 1847, the defendant had caused some saw logs to be placed in front of a point designated *sluice B.*, and that such logs, if continued, would prove injurious to the works, which required the water to flow through sluice B. as well as through the slide. The information, after stating a covenant contained in the conveyance from *Sherwood* to his then Majesty, which I shall not further notice, because it was admitted that it could not affect this application, proceeds to aver that, should the closing of sluice B. be repeated, the traffic and business of the said works would be greatly impeded in a way which could hardly be estimated, or possibly diverted into other channels, and the public revenue thereby much diminished.

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The information then sets forth a pretence made by the defendant, that prior to the construction of the Chaudiere slides, he, the defendant, had a dam in the river, and that the officers employed in the construction of those works had promised that the bottom of the slide B. should not be lower than the top of his dam had been, and this pretence is said to be false; and it is charged that, on the contrary, the defendant, *in November, 1846*, and since, claimed a right to the uninterrupted use of the water, and threatened

not only to remove a log from gate A., as he had already done, but to remove the gate altogether, as he claimed a right to do. And it is further charged that the defendant, so far from acceding to the request of the officer in charge to open sluice B., affirmed his right to close the same as he should find it necessary for his mill. And the information, having alleged that any interruption of the works for even a few hours, during the passage of timber, would produce a considerable loss of revenue, charges that the defendant persists in his wrongful acts, and avows his determination to repeat them as he should see occasion.

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The prayer is for an "injunction, restraining the said *Daniel McLaughlin*, his workmen, servants and agents, from placing or causing to be placed, any rubbish heaps or piles whatsoever in the said channel or elsewhere, in any part of the said slides, or any work, matter, or thing connected therewith; and from removing, displacing, or anywise disturbing or intermeddling with any stop-logs or other logs, matters or things, now or at any time hereafter to be let down or placed or fixed in the said entrance-gate; and from in any manner cutting or forcing open or opening the said entrance-gate, when the same shall be closed, at any time or times; and from in any manner hindering, obstructing or delaying any repairs or repair whatsoever to the said slides, or any part thereof, and from closing or in any degree stopping up, obstructing or incumbering the said sluice-gate, in any manner; and from, at any time or times, hindering or preventing any water from, or diminishing the quantity of water, passing through the same; and from doing, committing, or causing, or suffering or permitting to be done, committed or executed, any act, deed, matter, or thing whatsoever, whereby or by reason or in consequence whereof the said slides, or any of them, or any parts or part thereof respectively, or any work, matter, or thing, appertaining thereto or connected therewith, or the operation, use or business thereof, may be injured, damaged, hindered, obstructed, retarded, or prejudicially affected in any manner whatsoever; and also her Majesty's most gracious writ of subpoena to appear and answer, to be directed to the said *Daniel McLaughlin*."

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1849. The defendant's answer was filed on the 8th of December, 1848. But the conclusion to which we have come, precludes the necessity of any detailed statement of its contents. It will suffice to say, that the defendant claims a right to enjoy the water of the Ottawa in its course; affirms that the agents of the Crown, in defiance of his rights, have on repeated occasions wrongfully shut off the water from his mill by means of the entrance gate, which interruption on one occasion continued for a period of six months; and that the bottom of sluice B. was, *after the completion of the work*, lowered so as to diminish materially his head of water. He swears that neither the entrance-gate nor sluice B. is in any respect necessary to the successful operation of the slides, and that no rubbish has ever been accumulated in the channel, sufficient to obstruct the passage of timber in any degree; and he claims a right to the use of the water for the purpose of carrying away the refuse of his saw mill.

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Judgment. The learned counsel for the Crown now move for a special injunction, in the terms of the prayer of the information, upon the admissions in the answer, which they contend they are entitled to on a two-fold ground. 1st, because the conduct of this defendant is a direct breach of the covenants entered into by *Frith*. And 2ndly, because the jurisdiction of this court to enjoin trespass is now firmly established, where the injury would be otherwise irreparable. They argue that the injury stated in the information comes within the definition of *irreparable* injury, and that this court will not only enjoin the defendant upon the final determination of the rights of the parties, but will in the interim keep matters in *statu quo*, until such determination.

We think that the learned counsel for the Crown have failed to establish the propriety of granting this injunction, upon either of the grounds insisted on by them on the argument of this motion. But beyond the points then discussed, we are very clear that no case has been made on behalf of the Crown which could warrant the interference of the court. The Attorney-Generel has told us, in the information, that "*the soil of the river Ottawa is vested in her Majesty in right of her Crown.*" That is the single allegation upon which this

whole information has been based. He has no where informed us whether he claims, on behalf of the Crown, a right to obstruct the natural flow of the water of the Ottawa, in any way or to any extent; and the court is of course uninformed of the grounds upon which such claim is supposed to rest. The soil is said to be in the Crown, but that fact does not necessarily import any right to obstruct or divert the water; nay, it is quite consistent with the right of every riparian proprietor, to insist upon the water being allowed to flow in its accustomed course. The soil underneath streams is frequently vested in the subject, but that by no means imports a right to interfere with the easement of the riparian proprietors, to have the water flow on over the soil at its natural level. Nay, it is quite consistent with such easement.

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But we were referred to the 9th Vic., ch. 37, as establishing a legislative title in the Crown. Assuming that we are to take notice of this act, though it would undoubtedly have been more in accordance with the rules of pleading to have referred to the statute, and deduced from it such rights as it was supposed to confer, yet, without deciding any thing upon the form, and assuming that we can strengthen the case by reference to that enactment, still the case made by the information remains imperfect as ever. True, the act has vested in her Majesty the slides on the Chaudiere rapids. But there is no allegation that the slides, as they *then* existed, did in any degree interfere with the rights of the proprietors upon this stream. For aught that appears, the legislature may have intended to improve the stream, so far as that could be accomplished without any injurious obstruction of the water, and without any intention of affecting the rights of occupiers. But whatever may have been the purpose of the legislature, there is no allegation that, at the time of the trespass, the works remained in the same condition they were in at the time the act in question received the royal assent. Suppose that, at the period alluded to, there had been no entrance gate, or that the one then existing wanted the stop-log, which the defendant is said to have removed. Suppose the sluice B., instead of remaining

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1849. as at the time the act passed, to have been lowered so as to diminish the defendant's head of water; could it be argued that an act vesting in the Crown works, injurious to the defendant in a minor degree, or possibly in no degree at all, would in any way confer a right to alter such works so as to destroy or materially injure his water power? Assuredly not. The defendant is upon the face of this information stated to be a riparian proprietor; *prima facie*, he would be entitled to the benefit of the water flowing by his mill, without obstruction or interruption. Nay, his right is to a great extent admitted by this information itself. What is there to justify the servants of the Crown in shutting off the water from the defendant's mill, by closing the entrance gate? Consistently with all that appears either in the information or the act, that erection may be a nuisance, and the defendant instead of a wrong-doer, may have only exercised an undoubted legal right in entering to abate it. (a)

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Judgment.

Upon these grounds, we are of opinion, that this motion must have failed, even though we had considered the cases cited and reasoning urged upon us by the learned counsel for the Crown as applicable. But we have not felt at liberty to pass over the important points raised in the argument; because, although this power of the court to interfere by injunction has been very frequently invoked, and is certainly highly beneficial, we yet feel that great danger attends its exercise, and that no branch of equitable jurisdiction requires greater discretion and caution. We are not insensible to the difficulty, if not impossibility, of bringing all the cases in which a special injunction should be granted within any general rule, and we think that we should ill discharge our duty were we by any general proposition to limit the power of the court in this respect. For if it be the duty of courts of equity in *England* to modify their rules and practice to meet the growing wants of society, *a fortiori*, must we labour to render those rules effectual for the ends of justice in our social condition, differing as it does in many respects so widely from that

of England. And if the observation be true as regards 1849. the general equitable jurisdiction, its force cannot fail to be peculiarly felt in relation to the particular branch we are now considering, which has been from time to time modified by the English courts to meet new emergencies, and although likely to be ere long further varied, is plainly perceived to be administered, in its present condition, on very different principles from those which governed its exercise half a century since. The series of decisions before Lord *Cottenham*, collected and reviewed in the case of *Tobin* and *Merritt* in this court, have corrected much of the abuse which had gradually crept into the practice of the court in restraining actions at law, and have placed that branch of the jurisdiction on a satisfactory footing. But the principles by which this court is governed in granting special injunctions, would seem by no means so clearly defined, and in relation to the power here invoked, of restraining trespass to realty, appear to accord but imperfectly with reason. Before considering, however, that branch of the case, we shall refer to the argument arising upon the covenants in the lease, which seems to us quite free from doubt. It has been argued by the learned counsel on behalf of the Crown, that it is the daily habit of this court to enforce by injunction the performance of covenants; that here the defendant has covenanted not to injure any public works in existence at the time the indenture of lease was executed or thereafter to be erected; and that this court will restrain the flagrant breach of those covenants by the special injunction now asked for. It cannot be doubted that this court is in the daily practice of enjoining parties from violating their covenants, and that it will, *under circumstances*, exercise its power by special injunction, pending the final determination of the rights of the parties. We believe this power, carefully exercised, to be highly beneficial, and feel no disposition to restrict in any degree those modern decisions in England, which have determined that purchasers of land, with notice of the existence of covenants, will be restrained by this court from violating such covenants, although they do not run with

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1849. the land, and are therefore inoperative *at law* against the party enjoined. (a) But if that doctrine be clear, it is equally evident that it can have no effect upon this case, for the covenants are manifestly restricted to public works erected "*upon the demised premises*," while all those specified in the information have been erected upon land vested in the Crown, and alleged to be in the actual possession of its agents.

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But it has been argued further, that the jurisdiction of this court to enjoin against trespass has now become firmly established; that the information states a case of irreparable mischief; and that this court ought, therefore, to preserve every thing in *statu quo*, even though the title of the Crown should be regarded as doubtful.

Judgment.

Undoubtedly this court has jurisdiction to restrain acts, which a party is bound either by contract or duty to abstain from. And in the exercise of that jurisdiction it will maintain things in *statu quo*, *pendente lite*, not only where the title of the plaintiff to relief is unquestioned, but even where that title is doubtful, provided it sees that there is a substantial question to be settled. We feel indeed, that much care and caution are requisite for the beneficial exercise of this power; but we also feel, that were the jurisdiction of the court in this respect restricted, it would in many cases want the means of doing substantial justice between the parties. The *Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company* (b) involved enormous pecuniary interests. The interim injunction there was strenuously resisted, as vitally affecting most important interests, while the equity of the plaintiff remained as yet undetermined. But in that case we find this language attributed to Lord Cottenham: "It is certain that the court will in many cases interfere and preserve the property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming any opinion as

(a) *Tulk v. Moxhay*, 13 Jurist, 26, 89; *Mann v. Stephens*, 15 Sim. 377; *Rigby v. Great Western Railroad Company*, 2 Phil. 44.

(b) 2 Ph. 597.

to such rights. It is true that no purchaser *pendente lite* 1849.
would gain a title, but it would embarrass the original purchaser in his suit against the vendor, which the court prevents by its injunction. Such are the cases of *Echloff v. Baldwin*; *Curtis v. Lord Buckingham*; *Spiller v. Spiller*,
(a) It is true that the court will not so interfere, if it thinks there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the plaintiff.

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“If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favour of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?” Judgment.

The case of *Hills v. Croll*, (b) would seem hardly reconcilable with the current of authority. But the injunction was refused there on a principle which has no application to the present case. It was contended there that the contract wanted mutuality, and that the court, as it *could not* enforce performance by the plaintiff, *would not* enjoin the defendant. We doubt, beside, whether that case has been thoroughly understood, the more so as Lord *Cottenham* in a more recent decision, (c) after a full review of the authorities, takes a different view of the law from that which his lordship would seem to have done in *Hills v. Croll*, according to the note in *Phillips*.

But assuming that the *Great Western Railway Company v. the Oxford and Birmingham Junction Railway Company* lays down correctly the rule of this court, and admitting that the ends of justice would be better attained by the application of that rule to cases of trespass, we are of

(a) Per Lord Redesdale in *Dow*. 440. (b) As reported in 2 Phil. 60.
(c) *Dietrichsen v. Cabburn*, 2 Phill. 52.

1849. opinion that the authorities would not warrant us in coming to such conclusion. If the ends of justice are better attained by preserving matters in *statu quo* pending litigation, in the class of cases to which we have referred, we know not why the same principle should not be applied, with even more propriety, in matters of trespass, and that whether the complainant be in or out of possession. Nevertheless, the law unquestionably is so, and it is for us to administer the law as we find it, and not to legislate. It is true, indeed, that Mr. Vice Chancellor *Knight Bruce*, in *Haigh v. Jaggard*, (a) is reported to have said: "I am not convinced that where a man is in possession, however full and complete, of an estate, simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any privity between them, such a state of things, if the party in possession by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust or invalid, does of necessity prevent a court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion house upon it, or other such acts." Reason seconds the doubt of his Honour. But we see no mode of giving suitors the benefit of that reasonable doubt in the face of direct decisions. In a recent case before Sir *James Wigram*, (b) the plaintiff laid claim to lands in Cheshire, stated that the party in possession had marked the trees on the estate and advertised them for sale by auction, that they were ornamental, and their destruction would be attended with irreparable mischief, and applied for a special injunction. After a careful review of the cases, and amongst the number that one before Vice Chancellor *Knight Bruce*, his Honour said: "There did not appear to be any case in which a party coming to this court against another in possession, who claimed to be entitled to cut timber, had ever obtained an injunction to restrain him from so doing, till his title had been established at law." And again: "The principle is well settled, that a party out of

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(a) 2 Coll. 231.

(b) *Davenport v. Davenport*, 13 Jurist, 227.

possession must establish his right at law before he comes into equity." In the *Attorney General v. Hallett*, (a) an information had been filed by the Attorney-General, on behalf of the Crown, stating an encroachment on the royal forest of Waltham in Essex. The Attorney-General had demurred to the pleas of the defendant; and pending the judgment of the court, the defendant having commenced to cut down the trees and underwood, the Attorney-General moved for a special injunction, which was unanimously refused. Baron *Alderson* says (page 573): "This is an application in equity; now in equity, if a wood is claimed in ejectment against a party in possession, no injunction lies against him in general for cutting it." And again (page 574): "This act on land within a forest would, without doubt, be waste. The question is, whether pending a trial of fact as to title we should grant an injunction."

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In the cases just cited, the court refused to interfere by special injunction against the party in possession claiming adversely to the plaintiff. The converse is equally true. This court will not, as a general rule, interfere *in favour of* a party *in possession* to restrain a casual trespass. (b) Judgment.

But here the defendant, judging even from the information, is not a mere trespasser. Looking to his answer, he asserts that he is entitled to have the water of this stream flow to his mill in its accustomed manner. *Prima facie*, as a riparian proprietor, he would undoubtedly be entitled to such an easement. The information has asserted no title in the Crown adverse to him. Under such circumstances, so far from being a trespasser, he would unquestionably have a right to enter upon the lands of the Crown, to abate that which, for aught that has yet appeared, is a nuisance. No precedent has been cited which could warrant a special injunction in such a case.

But we are clearly of opinion that, under the particular circumstances of this case, we could not have granted this application, although it had been brought within the rules which govern this court, in the exercise of its jurisdiction, as clearly as it seems to us to have been excluded. If

(a) 16 M. & W. 569.

(b) *Drewry*, 188; 19 Ves. 155; 3 Mer. 173.

1849. this court has been governed by a narrow and erroneous rule in refusing to prevent trespass by special injunction, in what does that error consist? Why, plainly in this; that pending the time *necessarily* consumed in determining finally the right, a mere wrong-doer may have it in his power to inflict injury which, though not irreparable in the eye of the law, would in common parlance be regarded as such. This is the ground upon which the interim interference of the court, where it does interfere, has been justified. Upon these grounds its refusal to interfere is objected against, where it declines to act. The desideratum therefore is a power to enjoin trespass, and preserve matters in *statu quo* pending the litigation. Does not the simple statement of the evil and its remedy show conclusively that the complainant can have no ground to ask, and this court no jurisdiction to grant, the protection of a special injunction, where the application has been delayed without necessity or some very cogent excuse? Where the complainant, instead of coming promptly for his injunction, and then pressing forward the determination of his rights, legal or equitable, suffers more time to elapse than would have sufficed, without injunction, to have obtained the decision of the proper tribunal? When this court grants a special injunction, unnecessary delay in proceeding to trial has been always deemed a sufficient reason for dissolving such injunction. How can the court grant the writ where unreasonable delay has occurred before it has been applied for?

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In the *Birmingham Canal Company v. Lloyd*, (a) the injury complained of was of the most serious character, drawing off the water by which the canal was supplied, yet Lord *Eldon* refused an injunction on account of delay, leaving the plaintiffs to their action at law.

In the *Earl of Ripon v. Hobart*, (b) the bill was filed by commissioners appointed by act of parliament, to improve the navigation of the River Witham from Lincoln to the sea, and drain the fens on both sides of the river. The defendants were commissioners who had been appointed by a local act, for draining certain fens within three parishes in

(a) 18 Ves. 516.

(b) 3 M. & K. 169.

the county of Lincoln. The bill complained that the course pursued by the defendants was likely to cause irreparable mischief by breaking down the banks of the Witham and flooding the country which the plaintiffs had drained. Lord *Brougham* in delivering judgment, said — “The danger apprehended in the *Birmingham Canal Company v. Lloyd*, was of a very serious nature—that of draining off the water from a great reservoir of the canal; and yet Lord *Eldon* refused the injunction, leaving the company, as he said, to take their chance at law, because they had delayed coming to the court till two years after notice to the defendants. Here indeed (his lordship continues) the delay was only nine months, but there was a counter notice in that case as well as this, and it made no difference in the consideration of the court as to the party’s laches. Lord *Eldon* then added, ‘they must establish their right to damages at law, before I ought to grant this injunction.’ So that he held this delay to have been sufficient to deprive them of the preventive relief altogether. But the conduct of the plaintiffs here gives rise to the further remark, that in a case of this kind, where the application is not against an admitted nuisance, but against a work which may or may not be noxious, according to circumstances, the party alleging mischief has no middle course between coming in the very first instance and waiting until he can satisfy the court by a verdict at law, that he is right both as to his title and as to the mischief.”

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And in *Parker v. The North Staffordshire Railway Co.*, (a) Lord *Cottenham* says: “A party coming for an injunction is bound to come quickly upon the discovery of his rights, and without having in any manner led the opposite party to suppose his case to be different from that which he really intends to make.”

Here the trespass and the threats occurred in November, 1846, and February, 1847. The bill is not filed till October, 1847, allowing an entire season of navigation to elapse. The answer comes in, in December, 1848, and the motion is only made in December, 1849. A simple enumeration of

(a) 12 Jurist, 589.

1849. the dates is conclusive against the granting a special injunction for interim protection in this case. (a)

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PARTRIDGE V. MCINTOSH.

Partnership—Sale by sheriff under an execution issued against one partner for a partnership debt—Parties.

Where a sale is made under execution issued against one partner, the assignee is only entitled to such partner's interest or share in the assets after payment of the partnership debts, and that too, even when the debt originally was due from the partnership to the execution creditors.

In a bill to liquidate the joint liabilities and wind up the affairs of the partnership, the partner whose interest has been so sold is a necessary party.

From the statements in the pleadings it appeared, that the plaintiff and one *Samuel Phillips* had been copartners in trade, carrying on business under the style or firm of *S. Phillips & Co.*, at Toronto—that shortly after the formation of the partnership, the plaintiff went to England, where he had ever since resided—that goods had been furnished by some of the defendants, for which they had received the partnership notes; these falling due and left unpaid, *Phillips* executed a confession of judgment for the amount due, with the understanding that execution was not to be issued until he became unable to meet his liabilities.

Statement.

After this *Phillips* paid a considerable sum on account, but becoming more embarrassed, execution was sued out on the confession, and the sheriff proceeded to a sale thereunder, at which *McIntosh* became the purchaser.

McIntosh then proceeded to exercise acts of ownership over the partnership effects, and excluded the agent of *Partridge* from all control or management of the business; claiming to have a right to dispose of the whole of the assets. On the other hand, the agent of *Partridge* asserted a like right.

A bill was thereupon filed praying for an injunction; an account of the partnership estate; payment of all partnership debts, and division of residue (if any) between plaintiff and *McIntosh*.

Phillips was not a party to this bill, and had been examined as a witness in the cause; *McIntosh* by his answer

(a) In this and the next cause *ESTEN*, V. C., gave no judgment, having been concerned in them while at the bar.

stated that he had acted in the purchase of the estate as the agent of *Moffatts, Murray & Company*, and in whose behalf he claimed to hold the whole stock, &c., of the partnership, they having been sold for a partnership debt. 1849.

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Moffatts, Murray & Company were made defendants by amendment, and answered to the same purport.

The cause coming on to be heard,

Mr. *Gwynne*, with whom was Mr. *Crickmore*, for the plaintiff:

The simple point to be decided is, what was the interest vested in the assignee of the sheriff by the sale. We contend that under the execution the sheriff could only assign the estate of the partner, and dispose of his interest in the partnership effects.

Heyden v. Heyden, (a) *Fox v. Hanbury*, (b) *Skipp v. Harwood*, (c) *Taylor v. Fields*, (d) *Dutton v. Morrison*, (e) *Beven v. Lewis*, (f) *Habershon v. Blurton*, (g) *Johnson v. Evans*. (h)

Here, although the goods were, as alleged, advanced by *Moffatts & Company*, for, and used in the business of, the partnership, still as they have chosen to take the confession against *Phillips* alone, they can take such interest in the joint effects as *Phillips* had, and no greater—that is one half of the assets after payment of all the partnership liabilities; and no equity here set up gives them any larger interest than if the debt had been exclusively a personal one. Argument.

If Mr. *McIntosh* had purchased for himself, no question could possibly have arisen as to what interest *Moffatts and Company* had in the partnership effects; and under the circumstances, they can be looked upon simply as purchasers at sheriff's sale.

The purchasers' duty was to have filed a bill in this court for an account and general settlement of the partnership affairs.—*Young v. Keighly*. (i)

Mr. *Burns* and Mr. *Crooks* for defendant:

The plaintiff seems to seek some fancied equity on his

(a) 1 Salk. 392.

(c) 2 Swans. 586; Coke. Litt. sec. 323.

(e) 17 Ves. 193.

(g) 11 Jurist, 161.

(b) Cowp. 449.

(d) 4 Ves. 396.

(f) 1 Sim. 376.

(h) 7 M. & G. 240.

(i) 15 Ves. 557.

1849. side without doing equity to others, and has already asserted a right to have the winding up of the partnership affairs.

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The plaintiff has been absent from the country ever since the formation of the partnership, leaving *Phillips* the sole and exclusive management of the business, and *Moffatts* and *Company* were unable to obtain any security, other than what *Phillips* alone was able to give them.

We submit, that it makes a material difference as to the rights of the partners, when the execution, although only against one, is for a partnership debt, contracted *bona fide* in the business of the partnership.

One partner can sell all the partnership goods, if done *bona fide*; so also, we contend, can he give security on them for the debts of the partnership.

The prayer ought to have been, to take an account of the partnership affairs and wind up the concern.—*Garbett v. Veale*, (a) and *Johnson v. Evans* (b) were referred to.

Mr. *Gwynne* in reply—

Argument.

The defendants, by their answer, admit that they had notice of the joint estate being insufficient to pay the partnership debts, and yet they insisted that they were entitled to hold one half the goods against all the other creditors; such a claim being inequitable, they must pay costs.

November 23.—The judgment of the court was pronounced by—

THE CHANCELLOR.—The plaintiff is one of the partners of the late firm of *Partridge* and *Phillips*. The defendants claim under an assignment from the sheriff of this district, made in virtue of a writ of *fieri facias* issued upon a judgment entered up against *Phillips* alone, upon a cognovit executed by him. The plaintiff asks from this court a declaration that the seizure of the partnership effects under this judgment against *Phillips*, had effected a dissolution of the partnership; he prays an injunction to restrain the defendants from intermeddling with the joint assets, until the affairs shall have been wound up, and the joint liabilities liquidated; and he claims a right to act in the winding up of this concern, by converting the assets and liquidating the liabilities, and asks the assistance of this court to give effect to that right.

(a) 5 Q. B. R. 408.

(b) As reported in 7 Scott N. S. 1035.

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At an early period of the difficulties between these parties, the defendants seem to have conceived that, although proceeding under a judgment against *Phillips* alone, they were still entitled to regard this debt, not as the separate debt of *Phillips*, but as a joint debt; and that this fact, by some mode of reasoning which we do not quite apprehend, entitled them under the writ to sell a moiety of the tangible effects of the firm, without reference to the state of the partnership accounts. Unfortunately for the interests of all concerned, this notion seems to have been persisted in down to a very late period, for we find it insisted upon by the answer. The point was, however, given up by the learned counsel, who opened the case for the defendant; and in our opinion rightly. For if it be clear law, as has been conceded on all hands, that *Phillips* could not bind his co-partner by the confession of judgment which he executed, then the conclusion would seem undeniable, that the defendants must be treated in all their dealings, under that judgment, as the separate creditors of *Phillips* (a). Were it competent to *Phillips* to confer upon the defendants, by executing such an instrument, any right, other than that of being regarded as his separate judgment creditors (and what is here contended for, viz.: the right to seize one moiety of the partnership effects, without reference to the partnership accounts, would be a most important benefit,) then could *Phillips*, to that extent, bind his co-partner. As a sale under this writ could not confer an unqualified title to the *entire* tangible effects of the firm, neither can it confer such a property in the *moiety*; the one claim is as contrary to principle as the other.

Judgment.

Apart from the question just stated, there would appear to be no difficulty in the way of defining accurately the rights of all concerned. Had this case assumed a somewhat different form, questions might have been raised which would seem as yet undetermined either here or in England. Has this court any jurisdiction to restrain a sale by the sheriff under the circumstances existing in this case? How are the proceeds in the hands of the sheriff to be dis-

(a) Hambridge v. De La Crouée, 3 C. B. 742.

1849. posed of? These are questions upon which very able men have differed. But no such difficulties arise here. It is clear law, that the property which the partners in a trading concern have in the effects of the society is not an absolute property in any definite part, but a qualified property, subject to the lien of the co-partners, to have the joint assets applied first in liquidation of joint liabilities, and then in settlement of the legal and equitable claims of the partners themselves. No partner has an absolute right or property in any part of the assets, except as the result of a general account. (a) If the interest of the partner himself is so qualified and limited, can that of his creditor be more extensive? It is admitted that the levy and subsequent sale amounted to a dissolution, and that the plaintiff has a right against his co-partner *Phillips*, as well as against these defendants, to come here for the purpose of winding up the affairs of the firm, collecting the assets, and discharging the debts. Until that shall have been accomplished, it must be utterly impossible to ascertain the interest of *Phillips*, which and which alone the defendants can affect by means of this judgment. But it is equally clear that this court cannot administer the relief to which the plaintiff is entitled upon the record, as at present framed. The account to be directed is not an account as to the particular debt included in this judgment, or the particular chattels sought to be affected thereby; it is an account of the entire assets of the firm, and the discharge of all liabilities, as well as a settlement of all claims between the partners themselves. Can the court pronounce this partnership to have been dissolved, settle the share of *Phillips*, ascertain the debts due from the firm, and employ his funds in discharge of those liabilities in his absence? We are of opinion that the record must be amended; and we allow the cause to stand over for that purpose without costs, because the objection was not taken by the answer, nor indeed upon the hearing of the cause until suggested by the court.

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(a) Story on Partnership, 381; Garbett v. Veale, 2 Q. B. 408; Johnston v. Evans, 7 M. & G. 240.

We have at this stage expressed our opinion on some points of the case in compliance with the wish of both parties, in the hope of preventing, if possible, further litigation; and we are now asked to state further, with the same object, the order which we would feel it right to make in regard to the costs of the cause.

Had these parties confined themselves to an assertion of their clear and undoubted rights, no great difficulty could have been experienced in disposing of the question of costs; but they have each in turn insisted on claims clearly unsustainable. The plaintiff, while viewing rightly the effect of the seizure and sale, and most of the consequences which should result, has insisted on his own right to proceed in winding up the business to the exclusion of the defendants; and the defendants, on the other hand, have both claimed a right to one moiety of the joint effects, irrespective of the state of the partnership accounts, and further, acted upon that claim, not only by entering into possession, but even to the extent of a sale of the property; conduct clearly unwarrantable, and which, unfortunately for all concerned, seems to have rendered this suit indispensable.

We do not feel it proper now to pronounce any decided opinion in relation to the costs. *Phillips* of course will have a right to be heard when the record shall have been amended, and it is quite possible that we may then see good reason to alter our views. Our present opinions have been expressed in compliance with the desire expressed by the learned counsel, on both sides, with a view of preventing, as far as possible, further litigation.

Cause to stand over with leave to amend by adding parties—without costs.

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Judgment.

MEYERS V. ROBERTSON.

Practice—75th order.

Where a plaintiff endorses on the copy of the subpoena served on defendant Nov. 16 & 23. the notice prescribed by the 75th order of this court, he cannot afterwards proceed by attachment to compel an answer.

Mr. *Mowat* moved to discharge an attachment issued for

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Robinson.

want of answer, on the ground that the plaintiff had endorsed on the copy of subpoena served, the notice directed by the 75th order to be given, namely, "that unless an appearance be entered, an appearance will be entered for you; and if you do not answer the said complainant's bill at or before the expiration of twenty-eight days, &c., you will be considered as confessing the truth of the matters alleged in the said bill of complaint, and a decree will be made and enforced against you." An appearance was accordingly entered by the plaintiff, for the defendant, and no answer having been filed, he proceeded, by attachment, to compel one, and not to take the bill *pro confesso*, a course of proceeding which it was submitted was clearly irregular.

Mr. *Macara* contra. This practice has been pursued in some other cases, so that if the court should now be of opinion that the proceeding is irregular, it is not a case in which to charge the plaintiff with costs.

23rd November.—The judgment of the court was delivered by—

Judgment.

ESTEN, V. C.—In the case of *Meyers v. Robertson*, the suit has proceeded on the 75th order. The subpoena bore the usual endorsement and was personally served. An appearance was entered by the plaintiff for the defendant, and the answer not having been put in, an attachment was issued. The application is to set aside this attachment. We think it would be highly unjust to permit an attachment to issue after service of a subpoena with such an endorsement, and therefore that this attachment must be set aside, but without costs, as it appears that some cases have occurred in which such attachments have been allowed.

Per cur.—Attachment set aside without costs.

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CROOKS V. CROOKS, LESLIE ET AL.

CROOKS V. CROOKS, NOTMAN ET AL.

IN RE H. J. BOULTON AND R. J. TURNER, ON THE PETITION
OF JAMES LESLIE, ONE OF THE DEFENDANTS.

*Practice—Statements in petition framed under 163rd order—Payment of money
by solicitors into court—Entitling affidavits—Agency—Lien for costs.*

Dec. 8 & 14.

W.C., having filed a bill to administer the estate of his father, obtained from the court an injunction enjoining several judgment creditors, who had placed executions against the lands of the deceased in the hands of the sheriff, from proceeding thereon, until a decree for administering the estate could be obtained. After the injunction had been obtained, W.C., by the advice of his solicitor, sold part of the estate, and the greater portion of the purchase money was retained by the solicitor, upon which he claimed to have a lien for his costs.

A decree was afterwards obtained in the cause, making the injunction perpetual; after which the solicitor advised the conveyance of a large portion of the estate to his (the solicitor's) partner, upon certain trusts, whereby the eldest judgment creditor was entirely excluded from all benefit.

The agent of the solicitor advised a conveyance of another portion of the estate to one of the creditors, and obtained from this creditor a power of attorney to sell, under which he contracted to sell several portions of the lands so conveyed, and received several sums of money on account thereof, which he had also applied to his own use, with the exception of certain parts paid to his client.

The defendant, *Leslie*, upon these facts, filed a petition under the 163rd order, praying that it might be referred to the Master, to enquire and report if the sales have been beneficial to the estate; and if the Master should be of that opinion, then that the proper parties might be ordered to pay the amounts received into court.

Held per cur. that the proper order to make would be for a reference to enquire and report; and if the sales be adopted, then that the money remaining in the hands of the solicitors should be forthwith paid in without prejudice to the creditors' rights to get rid of the contracts.

Blake, Chancellor, *dissentiente*—who considered that the proper order to make was for the immediate payment of the money, whatever might be the ultimate disposition thereof.

But *held also, per cur.*, that had the petition given notice to the parties that that relief would be asked, sufficient appeared on the affidavits to warrant the court in making an order for immediate payment, pending the enquiry before the Master, and that the solicitors could not claim to have any lien for costs.

Held, also, that there did not appear sufficient either in the petition or in the affidavits to enable the court to pronounce any judgment as to the liability of the principal for the acts of his agent.

The affidavits and petition were entitled in the causes of *Crooks v. Crooks*, omitting any mention of the solicitors. *Held*, that the entitling was sufficient.

Semble—that where, from the nature of the facts, upon which a petition to the court is founded, they cannot be sworn to, it is not sufficient to make use of the short form given in the 163rd order, but that such facts should be stated in the petition, so that the respondents may be made aware to what extent and on what grounds relief is sought against them.

The facts of this case are so fully stated in the judgment pronounced by the court, as to render any statement here unnecessary.

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Mr. *Burns* and Mr. *Mowat* on behalf of the petitioner.Mr. *Vankoughnet* for the respondent *R. J. Turner*.Mr. *Galt* for respondent *H. J. Boulton*.Crooks
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Amongst the cases cited were *Wood v. Wood*, (a) *Wickens v. Townshend*, (b) *Floyd v. Nangle*, (c) *Skip v. Harwood*, (d) *Curre v. Bowyer*, (e) *Simes v. Gibbs*, (f) *Moore v. Macnamara*, (g) *Gaskell v. Durdin*. (h)

Dec. 14th.—The court this day gave judgment.

THE CHANCELLOR.—The petition filed in these suits has been framed under the 163rd order of this court, and asks the relief sought upon the facts disclosed in the accompanying affidavits. In regard to those facts (so far, at least, as they are material to the order which I think ought to be pronounced in this matter) they have been either admitted in argument, or so clearly established upon affidavit, as hardly to afford room for controversy. Those points treated at the bar as questionable, I leave out of the case as immaterial, in the view which I take of this application.

Judgment.

It appears that *Leslie, Street, Burnham*, and *Crooks*, four of the defendants in the first mentioned suit, having obtained four several judgments, and sued out executions thereon, the plaintiff, who is the son and heir-at-law of one *William Crooks*, deceased, filed his bill in the month of June, 1840, praying that those judgment creditors should be restrained from proceeding further upon their executions; that an account should be taken of the personal estate of *William Crooks*, deceased; that it should be applied in payment of the judgment debts; and in case of deficiency a sale of the reality, or of so much as might be required. *Mary Crooks* and *James Crooks*, the personal representatives of *William Crooks*, deceased, were made parties defendant. A *special injunction*, as prayed by the bill, was issued shortly after the institution of this suit; and in the month of September, 1842, a decree was pronounced by which that injunction was made perpetual; an account of the personalty was directed; and in case of deficiency a sale of the realty, as

(a) 4 Russ. 558.

(c) 3 Atk. 568.

(e) 3 Mad. 456.

(g) 2 B. & B. 186.

(b) 1 Ru. & M. 361; Exp. Scallan, 1 Mol. 63.

(d) 3 Atk. 564.

(f) 2 Jurist, 418.

(h) 2 B. & B. 170.

the Master might think best ; and payment of the judgment 1849.
creditors, according to priority.

In the month of July, 1841, a second suit was instituted by the same plaintiff against the personal representatives of *William Crooks*, deceased ; and one *Notman*, who, having obtained judgment since the institution of the first suit, had placed an execution in the hands of the sheriff. The prayer of this bill was similar to that of the former, save that it asked for the general administration of the estate of the deceased. A special injunction was applied for and granted in this suit also ; and by the decree pronounced on the 4th day of June, 1845, the two suits were consolidated ; an account and application of the personalty in payment of *all* the creditors of the deceased, according to priority ; and a sale of the realty in case of deficiency ordered.

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I have not stated the proceedings in these suits with as much particularity as I should have desired, because in this as in several other respects the affidavits laid before us are wanting in that clear and orderly statement which would have been desirable ; and I have been obliged to supply some particulars from my notes of the admissions of the learned counsel in the course of the argument. I apprehend, however, that the statement will be found sufficient for the decision of the application.

Judgment.

In both of these suits, and up to the close of 1848, Mr. *Boulton*, one of the respondents, was solicitor for the plaintiff, as also in several other suits subsequently instituted ; and Mr. *Turner*, another respondent, was the agent of Mr. *Boulton*, and also of Messrs. *Smith & Crooks*, the solicitors of *Mary Crooks*, *James Crooks*, and *Ramsay Crooks*, three of the defendants in the first named suit, and of *Mary Crooks* and *James Crooks*, the personal representatives of *William Crooks*, deceased, defendants in the second suit.

It would appear that no money was paid into court by the personal representatives of Mr. *Crooks* ; and that (with the exception of a sum of £50 paid to *Street*) no payment has as yet been made to any of the creditors.

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It is alleged, that some time during the year 1842, and about the month of August in that year, Mr. *Boulton* sold three several parcels of the real estate which the plaintiff had inherited from his father, without the sanction of the court, and that he received the purchase moneys, amounting together to £487 10s.

Mr. *Boulton* alleges that these sales were effected by the plaintiff, and that he only acted in the matter as the plaintiff's solicitor. He admits, however, that he prepared the conveyances, and received the purchase moneys in part payment of his costs in these and other suits, with the exception of £62 10s. paid to the defendant *Street*, and £12 10s. paid to *Mary Crooks*, in lieu of dower. Mr. *Boulton* asks to be allowed these payments, as also a sum of £150 paid to *William Crooks*, and claims a lien upon the residue for the amount of his several bills of costs, taxed, as it would seem, at £558 12s. 7d.

Judgment. I do not find it necessary to examine the evidence as applicable to those statements, because the facts as admitted on both sides seem to me sufficient to warrant the only order which I think we can properly make on this petition. Portions of the estate to be administered have been sold, without the sanction of the court, through the instrumentality of the solicitor, and £487 10s. has been received by him.

It appears further, that by indenture, bearing date the 23rd of March, 1843, between the plaintiff *William Crooks*, of the one part, and Mr. *McLean*, then a partner of Mr. *Boulton*, of the other part, various other portions of the real estate of *Crooks*, deceased, were conveyed to *McLean* in fee in trust to sell as he *McLean* might deem best, and to dispose of the proceeds in payment of the claims of *Burnham*, *Street*, and *Ramsay Crooks*, (the judgment creditors who had been made defendants in the first suit, with the exception of the present petitioner *Leslie*,) and to pay the residue to the grantor *for his own absolute use and benefit*. It would appear that no sales have been effected under this deed.

By articles of agreement entered into upon the 11th of

October, 1844, between the plaintiff of the one part and *Ramsay Crooks* of the other part, by and with the assent of *James Crooks* and *Mary Crooks*, after in part reciting the decree in the first suit and the debt to *Ramsay Crooks*, it was agreed, that the plaintiff should sell to *Ramsay Crooks* a large portion of the estate which the plaintiff had derived from *William Crooks* deceased, for the sum of £2725. The articles expressed that this sale was to be carried out with the approval of the Master, and provided for conveyances by all proper parties so soon as the necessary proceedings should have been completed.

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By articles of the same date it was declared, that the object of the above agreement was to enable *Ramsay Crooks* to sell the land and pay his debt, and that the balance, if any such should remain, was to be paid to the personal representatives of *William Crooks* upon the trusts of his will. These agreements were prepared, and their execution obtained by the respondent Mr. *Turner*.

After the execution of these instruments, and between Judgment. that time and the close of 1848, various portions of the real estate were sold by Mr. *Turner*, and on such sales portions of the purchase money were received by him, amounting in the whole to £1184 6s. 10d. I purposely omit some of the sales, in regard to which the creditors have instituted other proceedings, and ask no relief upon this petition.

The petitioner alleges, that by two several letters of attorney, dated respectively in April and July, 1845, *Ramsay Crooks* did authorise Mr. *Turner* to dispose of a small portion of the real estate in those instruments specified, but that the respondent had sold various parcels of land not specified in those instruments, and without authority. Mr. *Turner* on the other hand swears that he acted under a general authority conveyed in letters, portions of which he sets out in his affidavit; and he affirms that the sales were assented to by the parties interested. Many enquiries suggest themselves, and no doubt would be material were we called upon to decide between these conflicting statements: I do not find that to be now necessary. It is admitted on all hands, that a large portion of the estate to be adminis-

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tered in this suit has been sold, or contracted for, through the instrumentality of Mr. *Turner*, without the authority of the court; and that he has received portions of the purchase money on these sales, amounting in the aggregate to £1184 6s. 10d.

Mr. *Turner* swears that it was his intention to have obtained the sanction of the Master to all these sales, so soon as the proper time should have arrived, (namely, so soon as the Master should have signed his report). He states that up to a recent period he was led to believe that the estate would be amply sufficient to meet all demands; and he claims to be allowed his payments to *Ramsay Crooks* and *William Crooks*, and a lien on the balance for his costs.

It is material to be observed, however, that no proposal in regard to any of these sales was ever brought into the Master's office, and that up to this time even the judgment creditors in the first suit remain unpaid.

Judgment. The prayer of the petition is "That *Henry John Boulton* and *Robert John Turner* may be directed to answer the matter of the said affidavit, and that it may be referred to the Master to enquire into and report the facts specially; and also, whether it be advantageous to the estate that any of the sales so made be confirmed, and if so, then that it may be ordered that the proper parties do forthwith pay into the Commercial Bank to the credit of the above causes the purchase moneys of such sales, or that such other order be made as the facts may require.

The learned counsel for the petitioner did not suggest to the court any other relief than that specially prayed.

Now, one cannot help observing, that very much both of allegation and proof is wanting to warrant the court *in even entering upon* some of the topics introduced in the argument of the petition, or to decide others then raised. No objection was urged against the form of these proceedings. But, upon the assumption that it was competent to the petitioner to have combined the different objects embraced in this application, one cannot but feel how much that is most material has been omitted. What is the present position of this cause in the Master's office? What has been the

result of the account of the personalty? What steps have been taken towards a sale of the realty? Whether it is likely that the estate will prove sufficient? But above all, the cause of the apparently unreasonable delay which has arisen in the causes. Before visiting parties with the consequences of improper delay, the court is bound to see that the charge has been explicitly made against the respondents; and in a suit of this character the court ought to receive a clear and satisfactory explanation of the laches of which the creditors themselves or their solicitors have, at least apparently, been guilty. The remedy for delay was with themselves. They might have applied for the conduct of the suit. Why has not that been done?

Some points, too, of considerable magnitude were raised in the course of the argument, as to the liability of Mr. *Boulton* for the defaults of Mr. *Turner*, who, as it is alleged, must be regarded as his agent throughout those irregular proceedings. But I do not find any where in these papers such explicit allegations as would be absolutely necessary to warrant the court in coming to any conclusion respecting the motives by which these respondents have been actuated in the conduct of these causes, or to fix them with liabilities growing out of constructive agency not averred. This summary jurisdiction is, no doubt, both beneficial and necessary. But it must not be abused. Solicitors have a just claim to the protection of the court in the discharge of their onerous and delicate duties; and it is the sacred duty of those to whom this large discretionary power is committed, to take care that those who invoke that power shall furnish an explicit statement of the case intended to be made, before proceeding to fix upon solicitors extraordinary liabilities, or suffering their motives to be impugned. I have not lost sight of the fact, that the literal adherence of the petitioner to the rule of court to which I have referred, may have betrayed him into some of the difficulties in which he is placed, but I am of opinion that it cannot have been the intention of that rule to exempt a petitioner from the necessity of furnishing a respondent with the fullest notice of the case intended to be made against him. Some of the alle-

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gations necessary for that purpose may be conclusions fairly deducible from facts alleged. Their nature may preclude them from being properly affirmed on oath. But such allegations cannot therefore be properly omitted; they find their proper place in the petition, and are absolutely requisite, before the court can permit such enquiries to proceed.

I feel, moreover, very forcibly the justice of the rule laid down by Chief Justice *Wilde*, on a recent occasion, when in disposing of an application of this sort, he is reported to have said: "You may take the first branch of the rule, but not the last. The courts have long since ceased to grant rules calling upon attorneys to answer the matters of an affidavit."—*Belcher v. Goodered*. (a) And although that rule neither agrees with my own experience in the courts of this province, nor with my recollection of the English rule, yet I find sufficient in the statement of that learned judge, coupled with the other considerations which I have mentioned, to lead me to the conclusion that the court cannot safely or properly enter upon several of the enquiries suggested in argument.—*Burton v. Chesterfield*, (b) *Re Grantham*. (c) Certain transactions have taken place. Those transactions, in my judgment, entitle the petitioner to relief, and subject the respondents to liabilities. No improper motive has been attributed to these respondents, beyond what necessarily grows out of the acts themselves. To enter upon such enquiries without the clearest notice and the fullest opportunity of defence, would appear to me palpably unjust; besides that, the court has been left in ignorance of very many points which would have been absolutely necessary to the determination of such issues. For these reasons, I consider the petition as resting on the naked facts detailed in the affidavits, and confined to the specific relief pointed out in the prayer. *Van Sandau v. Moore*. (d)

Before enquiring what order it will be proper to make upon those facts, I desire to make an observation or two relative to the suits out of which this petition has grown,

(a) 4 C. B. 472.

(b) 9 Jurist, 373.

(c) 4 D. & L. 427; Re A. B. 4 Jurist, 630.

(d) 1 Russ. 441.

lest, in being silent, I should be regarded as affirming the regularity of proceedings about which I feel great difficulty, and upon which my learned brother who pronounced the decrees now feels considerable doubt. Whether it was competent to *William Crooks* to institute the suit commenced in 1840? Whether, on the hypothesis of such a right, he would be entitled to an injunction of the character granted in that suit? (It forbad all creditors from proceeding to acquire a lien by judgment or otherwise upon the lands of the testator.) Whether an injunction should have issued, restraining creditors who had obtained judgments and issued execution before the institution of the suit in this court? These are questions, all of which admit, to say the least, of serious doubt. But assuming it possible to answer all of them in the affirmative, then it does seem very clear that no special injunction should have been issued. Nay, in the first-mentioned suit, the practice of the court would not warrant such an injunction, even upon a decree to account. It could only properly issue upon final decree. (a) These points, as I mentioned, are not now before us. The petitioner has been restrained for a period of nearly ten years, we must not refuse him relief because the plaintiff's proceedings have been unwarranted. We must give him such relief as the facts seem to us to warrant, upon the supposition that every thing heretofore has been rightly constituted. The observation has, however, a material bearing upon the merits in one respect, for it may, we think, be affirmed with certainty that the power of the court has been carried to the utmost verge in favour of the plaintiff.

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In disposing of this petition upon the merits, I gladly acknowledge the spirit of candour and fairness with which the matter was argued by the learned counsel for the respondents, yet it seems to me, that the arguments adduced to us would tend to restrict the duty of solicitors within much narrower limits than reason would warrant, and in a way highly prejudicial to suitors. The confidential nature of the relationship which subsists between the solicitor and *his client* is felt by all; the absolute necessity that exists for

(a) Drewry on Inj. 108, and following pages, and the cases there cited.

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Crooks. the strict and watchful supervision of the court over its officers, is generally acknowledged. But the duty of a solicitor by no means ends there; as an officer of the court, in an important manner assistant in the administration of justice, he owes a duty to the court itself. (a) He also owes a duty to those to whom he is opposed. He must not make the rules and practice of the court a means of oppression. They have been devised for the furtherance of the ends of justice, and the solicitor who allows his zeal for his client to induce him to convert them to any other purpose, so far from being regarded as discharging his duty, is justly chargeable as guilty of a great wrong. In relation to an abuse of that sort Lord *Eldon* uses this language: "I hold an abuse of the rules of court to be a very great offence, especially in an officer of the court." *Van Sandau v. Moore*. (b) If the rules of the court must not be abused, *a fortiori*, solicitors must not be permitted to employ its process for any improper purpose. When an application to commit for breach of an injunction, by one who had not been served with the writ, but had notice that it was ordered, was resisted, on the ground that it would be in the power of a solicitor, by asserting that a writ had been issued, to inflict serious injury, Lord *Eldon* said, "The answer I give to that objection is, that many acts are authorised by law that may be very injurious; and the only protection against such injury is the heavy punishment that awaits such an act; as the solicitor so intimating, without foundation, that an injunction had been granted, would unquestionably be liable to be struck off the roll, to make satisfaction to the party injured, and to an indictment for so doing."—*Kimpton v. Eve*. (c) In another case, where an attorney, who had given an undertaking to enter an appearance, failed to do so, by which the plaintiff lost a trial, Mr. Justice *Williams* ordered the attorney to pay into court the amount claimed by the plaintiff.—*Morris v. James*. (d) And it is too clear to require the citation of authority, that this court must have the power to punish, as for a contempt, those who are guilty of contravening its decrees, although not expressly enjoined by its process. Such persons

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(a) *Re Elsam*, 3 B. & C. 597.
(c) 2 V. & B. 352.

(b) 1 Russ. 441.
(d) 2 Jurist, 842.

cannot indeed be committed *for a breach of the injunction*, but they may be guilty of contempt, and as such equally liable to committal as though they had been named in the injunction. Lord *Wellesley v. Lord Mornington*, (a) is an instance of that kind.

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But if the important and delicate duties discharged by solicitors, and the exclusive privileges conferred upon them in our mode of administering justice, render it absolutely necessary to take this more enlarged view of their duty in ordinary suits, how indispensable must that be in causes constituted like the present suit. The jurisdiction by which this court compels creditors to come here for relief in administration suits, has long been felt to be arbitrary, the probability of injury from collusive proceedings frequently observed upon. The jurisdiction has nevertheless been sustained upon this, as well as upon other grounds, that it is necessary to prevent the utter ruin of estates from multiplicity of suits. This object is effected by treating the decree, not as the decree of the plaintiff, but as a decree for all the creditors; and it hardly needs either argument or authority to prove that the court which assumes such a jurisdiction, upon such hypothesis, must exact from all concerned not only unflinching integrity, but also a ready alacrity in rendering the decree effective for the interests of all. It was with reference to a suit of this character that Lord *Redesdale* observed: "It is very necessary that good faith should be kept in the prosecution of proceedings of this nature, otherwise estates would be ruined by multiplicity of suits; this is the principle on which the court allows persons, having charges on estates, to file bills for their own benefit, and the benefit of other creditors."—*Largan v. Bowen*. (b) In *Paxton v. Douglas*, (c) the probability of injustice from entertaining such suits, seems to have pressed itself much on Lord *Eldon's* mind, and at the close of the case he observes: "Let the plaintiff lodge the exchequer bills with the defendant and pay into court £800 of the £1000, with liberty to apply if there is any delay. There is no application to which I would sooner listen than an application by any other person upon the least

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(a) 11 Bea. 181. (b) 1 S. & L., 299. (c) 8 Ves. 520.

1849. delay. In this very case the plaintiff might have compelled her to set out by her answer what she had in her hands. In these cases the plaintiff generally favours the defendant. The practice is for a favourite creditor to file a bill and snap a decree, and one solicitor is concerned for all parties. *But it is his duty to make the defendant set out what he has in his hands, for if he becomes insolvent, and an opportunity appears to have been lost, that solicitor would stand in great peril before this court.*" And in another case, where an attorney filed a bill in the name of the next of kin to a testator, making himself a defendant, in order to delay payment of money in his hands as executor, Lord *Eldon* said that he would commit any attorney who, to delay or evade payment of money under such circumstances, commenced a suit in that court and then delayed putting in an answer, for the purpose of keeping back moneys in his hands. —*Padete v. Lansdale*, (a) *Mootham v. Hale*. (b) In a case before Lord *Langdale*, an application was made to compel an attorney to pay moneys which he was said to have procured to be paid out of court to his client, with a knowledge that a stop order had been obtained, the learned judge, after affirming the principle, broadly says, "it is very rarely that such cases come before the court; I only recollect one, which came before Sir Wm. Grant, who said that the solicitor had better pay the money at once, and it was done." — *Ezart v. Lester*. (c)

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To apply these principles to the case before us, though differing from my learned brothers, and feeling on that account, as I ought and do, doubtful of my opinion, yet I confess that I cannot hesitate as to the order which the court is bound to pronounce. The plaintiff, in 1840, for the safety and protection of his own estate, asks and obtains the extraordinary interposition of this court, by restraining all creditors from proceeding to realize their debts from the estate of the testator. Decrees are afterwards made, rendering the injunction perpetual. In 1842 the plaintiff, through the agency of his solicitor, behind the back of the creditors, and of course without the sanction of the court, sells a portion of the estate, and the purchase money is either retained by

(a) 2 T. & V. Ch. P. 217. (b) 3 V. & B. 92. (c) 5 Beav. 585.

the solicitor or paid to the plaintiff. In 1843, considerable tracts of lands are conveyed to Mr. *McLean*, the partner of the plaintiff's solicitor, in trust, to pay three judgment creditors, and the balance to the plaintiff, excluding the oldest judgment creditor, the present petitioner. In 1844 a very large part of the estate is articulated to *Ramsay Crooks*, at a nominal price of £2725, and it is said that the sanction of the master is to be obtained. But by a contemporaneous instrument all this is declared to be but form, to enable *Ramsay Crooks* to pay himself and hand over the balance to the personal representatives of the testator, on the trusts of the will. Then commences a long series of sales reaching down to the close of 1848, all behind the back of the creditors, professedly for the benefit of *Ramsay Crooks*, upon which £1200 is received by Mr. *Turner*.

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Now all these dealings may have been had either in open violation of the decrees in these causes, and with the intent of fraudulently withdrawing the estate from the reach of the creditors, or they may have been *bonâ fide* with intent to administer the estate for the benefit of all concerned. I have before stated that, upon this petition, I am bound to assume that these respondents were not actuated by any improper motive. But be the intent what it may, surely no language can be strong enough fully to depict the objectionable nature of such proceedings. Surely the plaintiff who obtained the protection of this court, and those solicitors by whose agency that protection was sought and obtained, ought to have felt themselves bound in honour and conscience, quite as much as the defendants, by the injunction, from intermeddling in the estate. Nay, their conduct (whatever may have been its motive) in violating an injunction, obtained by themselves, for the benefit of all creditors, in assuming to dispose of an estate placed under the care and control of the court, cannot be regarded in any other light than as a gross contempt. Is it to be endured that a plaintiff shall first place himself in a position to commit any creditor who may attempt to sell a single acre of the estate to pay his judgment debt, and that notwithstanding such position, this same plaintiff is to be at liberty to

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1849. dispose of the entire estate, upon such terms, and through the medium of such agents, as he may think right?

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These transactions divide themselves into two branches, which admit in some degree of different considerations. As to the sales in August, 1842, the conduct of the plaintiff and his solicitor admits of the palliation, that the parties seem to have considered them necessary to meet the plaintiff's costs, which would in the ordinary course be ordered to be paid from the estate. That consideration cannot render those dealings less objectionable in their nature—cannot give them any validity. Yet, one sees that gentlemen not very conversant with the doctrines of equity, might be led into such a course of conduct without any improper motive. As to the next deed—I profess myself entirely unable to suggest any reason upon which that instrument can have been regarded as a proper deed for the plaintiff to execute. How the plaintiff, having obtained such a decree, can have felt himself at liberty to execute such a deed with such trusts, I am unable to comprehend; and why the first incumbrancer, the present petitioner, should have been excluded from all benefit, I am the less able to explain. It has, however, one redeeming feature, I am happy to be enabled to state, that nothing has been done under it.

Judgment.

As to the remaining sales, extending over so great a space of time, and producing such considerable amounts, without the knowledge of either court or creditors, while the cause has been lingering from year to year in the master's office, I can only say that such a course of conduct, if tolerated, would seem to me utterly to preclude the possibility of administering this sort of jurisdiction in the court. So forcibly did this view of the case strike me during the argument, that I felt the greatest difficulty in bringing my mind to the conclusion that this court could sanction any of these proceedings, having regard to the due administration of justice, and the general interest of the suitors of the court. Upon reflection, however, I have thought that we are not at liberty to refuse these creditors, who have been already so long delayed, such assistance as we may be able to afford. And in analogy to that class of cases, in which the court

has clothed with a fiduciary character persons who have assumed to act as trustees, guardians, or executors, it is our duty, in my opinion, to give the petitioner the opportunity he asks, of considering whether it will be for the interest of the estate to adopt these sales. And our order ought, in my opinion, further to direct the respondents to pay the costs of the application, and to deposit forthwith in the Commercial Bank the sums admitted to have been received, without any deduction.

My learned brothers dissent from the latter part of the order, which seems to me proper. They regard it as inconsistent to order the money to be paid into court prior to an election by the creditors to adopt the sales, and they look upon it as imposing unreasonable difficulties upon the respondents, having reference to their position in relation to the purchasers. These difficulties do not press on my mind. I think the prayer of the petition, that the creditors should have an opportunity of considering whether it is for the interest of the estate to adopt these sales, reasonable. And I think they have a right pending that enquiry, to claim that the moneys should be secured in court. Should the order place the respondents in a position of difficulty, that is attributable to a course of conduct which does not seem to me to merit any very tender consideration from the court.

JAMESON, V. C.—I entirely concur in all that has fallen from the learned Chancellor—whether as general principles or observations applicable specially to the present case—with the single exception of the *immediate* order for the payment into court of the money received by the solicitor and his agent from these irregular sales of land. I cannot but think that such payment into court should follow, and not precede, the enquiry before the Master, which is the object of the petition; as, until these sales shall be adopted as beneficial to the creditors, or rejected as injurious, we cannot be certain whether the fund belongs to the estate under administration, or to the purchasers who have been misled in these transactions. It is not probable that the estate can be damnified by the delay, because the substance of the property is still within the reach of the

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1849. court, though to a certain extent incumbered by these
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 Crooks. illegal sales. At the same time I think I should have concurred to the full extent of his judgment with the learned Chancellor, had the present application been in a more complete form, and all the parties concerned properly brought before the court: had the petition in fact been so framed that the professional respondents would have had full warning of the extent to which relief, as against them, would or might have been sought. *Ramsay Crooks* and *William Crooks*, recipients of part of the proceeds of these sales, are as well as the solicitor and his agent liable to refund, and ought I conceive to have been before the court as respondents on the present occasion, together with the professional respondents, against whom alone the enquiry is pressed, without, I think, that special notice to which they might be reasonably entitled in a case so deeply affecting their professional character.

Judgment. Therefore, while joining in utter disapprobation of the transactions now brought to light, and rejecting as totally untenable the solicitor's claim of lien for costs upon the purchase money arising out of these unauthorised sales, I feel that the ends of justice will not be jeopardised by allowing the payment into court to be immediately contingent upon the finding of the Master, if such finding should be warranted by the opinion of the creditors, that the adoption of these sales would, under the circumstances, be expedient.

ESTEN, V. C.—The material facts of this case are, that several judgment creditors of *William Crooks*, deceased, having executions against his lands in the hands of the sheriff, these suits were instituted by his heir-at-law against his personal representatives and the judgment creditors in question, for an injunction to restrain them from proceeding upon their judgments, until the estate could be applied in a due course of administration; that is to say, the personal estate in the first instance, and the lands only so far as the personal estate should be deficient. This appears to me to be a suit of a very extraordinary and novel character, and I doubt whether a precedent can be found for it. It is clear,

however, that supposing such a suit be maintainable, (and we have no concern with that question upon the present occasion,) it must partake of the nature of a creditor's suit, from which in fact it cannot in any material respect be distinguished. At the commencement of the suits, special injunctions were obtained restraining the judgment creditors, who were parties to them respectively, from proceeding upon their executions, and those injunctions have continued in force until the present time. The first suit was instituted against the personal representatives and four judgment creditors, and contemplated the satisfaction of *their* demands only. The second suit was instituted against the personal representatives and another judgment creditor, who was not embraced by the injunction granted in the first suit, and who, I presume, had obtained his judgment and issued and lodged his execution after that injunction had been issued. In the month of August, 1842, and some time after the commencement and during the pendency of both suits, certain lands, which were part of *William Crook's* estate and were subject to the executions of the judgment creditors at law, were sold by the plaintiff, through the medium of Mr. *Boulton*, his solicitor in the cause, and the purchase moneys were received by Mr. *Boulton*, with the exception of two sums of £12 10s. and £62 10s., which were received respectively by the heir-at-law and the personal representatives, and by one of the co-defendants, *Street*, a judgment creditor. The sums received by Mr. *Boulton* amounted to £412 10s. He prepared the conveyances to the purchasers. These sales occurred in the month of August, 1842, and the decree in the first suit was pronounced in September, in the same year.

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The first suit was instituted in 1840, and the decree in it was obtained in 1842; the second suit was instituted in 1841, and the decree in it was not obtained until 1845. In 1844, which was after the decree in the first suit, but before that in the second, a transaction, purporting to be a sale, took place between the heir-at-law, the personal representatives, and *Ramsay Crooks*, one of the defendants to the first suit, and who is alleged to be a judgment creditor of *Wm. Crooks*, but whose claim is admitted to be subsequent, in

1849. point of time, to that of the defendant *Leslie*, the petitioner in the present matter. This transaction proceeded under the advice of Mr. *Turner*, who was then acting as the agent of Mr. *Boulton*, the plaintiff's solicitor, and as the agent of Messrs. *Smith & Crooks*, the solicitors of the personal representatives and of *Ramsay Crooks*. Two agreements were prepared by Mr. *Turner* and executed upon this occasion. The first purported to be an agreement of sale by the heir-at-law to *Ramsay Crooks*, with the approbation of the master and under the decree; the second was a declaration of trust, by which it appeared that the sale was only a nominal one, and that in fact *Ramsay Crooks* was intended to be not a purchaser but a trustee. He was to re-sell the property, and after deducting from the proceeds of the re-sale his own debt, was to pay the balance to the executors of *William Crooks*. This transaction was wholly irregular; it was a fraud upon the court, upon which a nominal sale was to be imposed for a real one, and highly unjust to the petitioner

Judgment. *Leslie*, whose judgment was elder to that of *Ramsay Crooks*, in providing for the satisfaction of the latter claim in the first place. Such a transaction, although irregular and void, may take place without any bad intention, but it is one which is liable to the greatest abuse. Upon the conclusion of this nominal sale, *Ramsay Crooks*, acting as the owner of the property, which comprised 4,360 acres of land, gave a power of attorney to Mr. *Turner* to dispose of certain parts of it, and Mr. *Turner* received two letters from *Ramsay Crooks*, which, he says, he considered as giving him authority to dispose of the remainder. Accordingly he effected sales of a considerable portion of these lands, and received purchase moneys on account of such sales amounting to between £1100 and £1200; of this he states that he has paid £125 to *Ramsay Crooks*, but this fact *Ramsay Crooks* denies. It appears that Mr. *Turner* conducted these causes, and other causes or defences, relating to the estate of *Wm. Crooks*, as the agent of Mr. *Boulton*, until the close of the year 1848, when the conduct of these matters was transferred to Mr. *Morphy*, upon which occasion a taxation of Mr. *Boulton's* bill took place, at the instance of the plaintiff,

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upon the usual undertaking. An agreement was then made between Mr. *Turner* and Mr. *Morphy* that Mr. *Turner* should retain, out of the moneys in his hands, the produce of the sales above mentioned, and received in the course of the suits, all the costs due to Mr. *Boulton* and himself respectively, in the before mentioned causes, and in other causes relating to the estate of *William Crooks*, and that he should deliver up to him, Mr. *Morphy*, all the papers and documents in his possession relating to such suits; under this agreement the papers and documents above mentioned were accordingly delivered up. The costs amounted to the sum of £558 12s. 7d. This arrangement was probably made with the consent of *Ramsay Crooks*, for whom, I believe, Mr. *Morphy* was and is acting as solicitor. *Ramsay Crooks* by his affidavit in this matter, disavows all authority to Mr. *Turner* to dispose of any lands, except those mentioned in the two letters of attorney. The moneys produced by the several sales have remained in Mr. *Turner's* hands, with the exception of a comparatively small amount, stated in his affidavit to have been paid by him to various persons, until the present time.

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Under these circumstances the petitioner *Leslie* applies to the court for an enquiry, with a view to the confirmation of these sales and the payment of the purchase moneys produced by them into court. That Mr. *Leslie* and the other judgment creditors should have submitted to be delayed nine years in the prosecution of their just claims, is unaccountable. It is possible that insuperable obstacles may have existed to the speedier execution of the decree, but it is difficult to believe that such could have been the case. Certain it is that if the performanee of the decree was improperly retarded, it was in the power of the defendants, the judgment creditors, by obtaining the carriage of the decree, to have accelerated proceedings under it; and much of the sympathy which is due to creditors, who have been unreasonably delayed in the prosecution of their rights, must be withheld from persons who have evinced so little anxiety to protect their own interests. The object of the present application is to obtain an enquiry whether or not it is expedient

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to confirm the sales in question, and in case of their confirmation, for the payment of the purchase moneys arising from them by all proper parties, into court. The sales are admitted to be of no force unless confirmed, being in contravention of the decree, and the defendants might require the court to proceed in the disposition of the property as if they had not occurred. It may be expedient, however, to confirm them, inasmuch as the very existence of such contracts, followed, in some instances, by actual conveyances, may render a re-sale under the decree impracticable or extremely difficult. I think it would be competent for the judgment creditors to apply for the confirmation of these sales, and for the payment of the moneys received under them into court. I think, therefore, that the order prayed for by this petition ought to be granted to a certain extent, but not to the extent which is asked. In the first place, I do not think that enough is shewn in this case to connect Mr. *Boulton* with Mr. *Turner* in the transactions relating to the lands sold to *Ramsay Crooks*. In the next place, I think that the order ought not embrace moneys paid by Mr. *Boulton* and Mr. *Turner* respectively to their principals, but should be confined to moneys remaining in their hands. As between Mr. *Boulton* and *William Crooks*, Mr. *Boulton* was bound to pay the moneys produced by the sale of the lands, sold by or through him to *William Crooks*; and as between Mr. *Turner* and *Ramsay Crooks*, Mr. *Turner* was under a like obligation in respect of the moneys produced by the sale of the lands sold to *Ramsay Crooks*. It is true these sales were void, and the judgment creditors might have invalidated them and procured a re-sale of the lands comprised in them, under the decree, but they have not taken this course. They have applied to confirm these sales, but they cannot, as it appears to me, by means of such confirmation, make them sales under the decree *ab initio*, so as to render any disposition of the purchase money different from what would have been proper had they been sales under the decree, in fact, a breach of duty; such disposition having taken place previously to the confirmation, and being conformable to the agreement existing at the time between Mr.

Turner and *Mr. Boulton*, and their respective principals : as to the moneys therefore paid respectively to *William Crooks* and *Ramsay Crooks*, repayment must, in my judgment, be sought from those parties. No deduction, however, can be allowed, as it appears to me, in respect to the costs—the whole amount of which, it may be remarked, is claimed to be deducted by each from the moneys in his hands, so that if both of these claims were allowed, the costs would be twice paid. But *Mr. Boulton* can claim no lien upon moneys which are improperly in his hands, and which belong either to the purchasers or to the judgment creditors ; and although *Mr. Turner's* claim stands on a different ground, inasmuch as he surrendered papers and documents in his possession, and upon which he had a lien for his costs, in consideration of their retention out of the moneys in his hands, yet I think the conclusion must be the same in his case as in *Mr. Boulton's*. He states in his affidavit that he always intended to have these sales confirmed by the master ; in other words, that they should be sales under the decree, in which case the whole of the purchase moneys ought to be paid into court without deduction ; and it is fair to infer that such an undertaking was given to the purchasers, as an inducement to them to make their respective purchases ; moreover, I feel extreme difficulty in recognising any dealing with moneys on the part of a person who is improperly in possession of those moneys for his own benefit. The order must, therefore, in my opinion, extend to the whole amount remaining in the hands of *Mr. Boulton* and *Mr. Turner* respectively, without deduction ; but I cannot see the necessity or propriety of ordering these moneys into court, unless and until the sales shall be confirmed. The order that I should be prepared to make, if it were right in point of form, would be for a reference to the master to enquire and state whether or not it would be for the advantage of the creditors, that the sales in question should be confirmed ; and in case the master should be of that opinion, then that such sales should be proceeded with and completed, and that Messrs. *Boulton* and *Turner* should respectively pay into court the moneys produced by the sales in question and remaining in their

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respective hands ; but the order which I think is more correct in point of form, and which therefore I propose, is for a reference to the master to enquire into and report upon the expediency of confirming the sales, reserving the remainder of what may be necessary to be done for consequential directions after the master shall have made his report. The creditors who have claimed or shall claim their debts under the decree, and the other defendants, who are interested in the decision of the question, will have an opportunity of attending before the master. I do not think that any doubt can be entertained of the jurisdiction of the court in this matter. It is quite clear that both *Mr. Boulton* and *Mr. Turner* acted in their professional capacity in the matters complained of, if *that* be necessary, but I do not think it is, to sustain the present application ; if they had not been solicitors at all, but mere agents aiding in the disposition of property under the control of the court, and had received the moneys produced by such disposition, they would have been equally liable to be ordered, upon a summary application in the cause, to pay such moneys into court. With regard to the title of the petition, I have no reason to think it otherwise than correct, and I should regret much to see the petitioner, who has so much justice on his side, defeated on a point of form, when the objection has not been taken at bar ; and it is obvious that the parties principally concerned have not been taken by surprise, as the tenor of their affidavits shews that they anticipated a personal order against themselves respectively. I do not see why the solicitor and his agent should be selected as the only objects of this application. The other parties who have received part of these moneys should be ordered to pay them into court. The reference should, I think, embrace an enquiry whether *Ramsay Crooks* did not receive the £125 mentioned in the schedule to *Mr. Turner's* affidavit, about which some misunderstanding seems to exist. The sum paid to the heir-at-law is too small to deserve attention, and the £62 10s. paid *Street* it is not desired probably and not material to recal. With regard to the trust conveyance to *Mr. McLean*, about which I have as yet made no observation, it is idle to repeat the observations

already made; they apply to this transaction with full force. 1849.

I consider that I should ill discharge my duty on this occasion, did I fail to animadvert upon the proceedings which have furnished the grounds for the present application. It is necessary only to take a general view of these proceedings, in order at once to perceive their extreme impropriety. Judgment creditors who are on the point of enforcing their just claims at law, are restrained by injunction without the payment of any money into court, for nine years, while the lands which they would have taken in execution, had they been permitted, are indeed sold, but the proceeds of sale, instead of being applied to the satisfaction of their demands, or even secured for their benefit, are retained, and, it must be presumed, applied to their own use by the legal agents of the plaintiff, whose duty it was to prosecute the suit with the utmost diligence for the benefit of the judgment creditors, whom they had delayed in the recovery of their debts. As between Mr. *Boulton* and *Wm. Crooks*, I have no doubt that the retention of the proceeds of the sales effected in August, 1842, was a just and fair proceeding; and even as regards the judgment creditors, it was, perhaps, justified in the view of Mr. *Boulton*, by the certainty, which he probably entertained, that his costs would be ordered to be paid out of the proceeds of the sales under the decree in the first instance; but such considerations, although they may extenuate, cannot justify proceedings which would involve at once a gross contempt of the authority of the court, and great injustice towards the judgment creditors. With regard to the moneys in the hands of Mr. *Turner*, or the balance of them, after the deduction of his costs, it does not appear what was to be their ultimate destination, whether they were to be paid into court or to *Ramsay Crooks*. I forbear to question the motives which dictated the retention of these moneys, in the absence of all explanation which can throw light upon the subject. It is to be presumed that, when in Mr. *Turner's* opinion the proper time had arrived for the confirmation of the sales, the moneys which they had produced would have been forthcoming; but the impropriety, after stopping judgment creditors at law and obtaining a

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The order drawn up on the petition was, “ that it be referred to the master of this court to enquire, and state to the court, the value of the lands and the terms of the sales of the lands hereinafter mentioned, and whether or not it is expedient to confirm the sales mentioned in the affidavits filed in the matter of this petition, to have been effected respectively by *Henry John Boulton* and *Robert John Turner*, named in the said affidavits, of different portions of the real estate of *William Crooks*, deceased, in the said affidavits likewise named, regard being had to the possible difficulty of effecting a re-sale of such lands, by reason of the existence of such contracts; also to enquire and state what sums of money have been received by the said *Henry John Boulton* and *Robert John Turner* respectively, on account of such sales, and the times thereof respectively, and also whether the said plaintiff *William Crooks* and *James Crooks*, *Mary Crooks* and *Ramsay Crooks*, defendants above named, or any of them, received any and what part or parts, and how much respectively, of the moneys produced by such sales respectively, and from whom, together with the respective times of such receipt, and all particulars relating thereto; and the master is to report any special circumstances, at the request of any of the parties concerned, and in making the enquiries aforesaid, the master is to make to the parties all just allowances, and for the better making of the same, the parties are to produce before and leave with the master, upon oath, all deeds, books, papers and writings in their custody or power relating thereto, and may be examined upon interrogatories as the master shall direct; for which purpose and for the examination of witnesses if

necessary, a commission or commissions may issue into the country, directed to proper commissioners, or such examination may be had before an examiner or examiners of this court in the country, as the master shall direct. And it is further ordered, that the said *Henry John Boulton* and *Robert John Turner* do pay to the said petitioner his costs up to this time, and it is hereby referred to the master to tax the same. And this court doth reserve consequential directions and further costs until after the master shall have made his report."

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BETHUNE V. CAULCUTT.

Practice—Registration of equitable incumbrances—Mortgage—Foreclosure—Sale—Judgments.

Where a bill prays a foreclosure, and some of the parties interested are not before the court, a sale cannot be decreed.

The bill having been taken *pro confesso* against some of the defendants, under the general orders of the court, is not a reason for decreeing a sale as against those defendants.

Priority may be gained by means of prior registration, as between equitable incumbrances, but this priority will be defeated by notice.

Where plaintiffs and defendants mutually leave particulars in the dark which it is necessary the court should be informed of, a reference on those points will be made to the master.

Registered judgments bind lands from the time of their registration; but they do not, by means of such registration, acquire any priority over previous deeds, though unregistered.

Quere.—Whether a mortgagee praying a sale can have it, when the subsequent incumbrancers or the mortgagor do not consent.

Mr. *Hagarty* for the plaintiff.

Mr. *Hector*, Mr. *Crickmore*, and Mr. *Alex. McDonald* for some of the defendants.

The facts of the case, as also the authorities cited, are fully stated in the judgment of the court, which was delivered by—

ESTEN, V. C.—The facts of the case are, that the defendant *Caulcutt*, made a mortgage on the 27th of August, 1845, to the plaintiff, for securing to him £2000 and interest. Default was made in the payment of the mortgage debt; and on the 16th of August, 1848, a mortgage was made of part of the lands comprised in the first mortgage, (which included lots 17, 18 and 19,) namely, of lot 19, to the defendants, *Goodeve* and *Corrigal*, by the defendant *Caulcutt*, for securing to them the sum of £423 and interest, the amount

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of an endorsation by them to him at the *Bank of Montreal*. This mortgage was subsequently assigned by *Goodeve* and *Corrigal* to the *Bank of Montreal*, as a collateral security for the amount of this endorsation. On the 2nd of September, 1848, a mortgage was made by *Caulcutt*, to the defendant *Weller*, of all the mortgaged premises, for securing to him the amount of a promissory note, endorsed by *Weller* for *Caulcutt*, for £258, together with all costs and damages attending the defence of an action brought against *Weller* by the *Commercial Bank*, the holder of the note. *Caulcutt* on the 24th of October, 1848, made three several mortgages to the defendants *Delaney*, *Burns* and *Ruttan*, respectively. *Weller*, without admitting the fact of the registration of these mortgages to *Delaney* and *Burns*, alleges that they pretend that they were registered before his own, and claim priority on that ground; whereas he alleges that they had notice of his mortgage before theirs were executed; and himself claims priority over them, on account of such notice, notwithstanding such prior registration. *Weller's* mortgage was registered on the 27th of November, 1848.

Judgment

The defendants, *Browne*, *Gillespie & Company*, the *Commercial Bank*, and the *Bank of Montreal*, obtained several judgments against *Caulcutt*, which have been registered; and executions have been issued on them respectively, and delivered to the sheriff; but it does not appear whether these executions are against lands or goods. *Browne's* judgment was registered on the 12th, and *Gillespie and Company's* on the 16th of October, 1848. It does not appear when the judgments of the *Commercial Bank* and *Bank of Montreal* were registered.

The defendants *Goodeve* and *Corrigal*, and *Browne*, *Gillespie and Company*, who have answered the bill, admit generally all the allegations of the bill, but state their own respective claims particularly. The absent defendants, who have been personally served with subpoenas properly endorsed, and against whom the bill has been taken *pro confesso*, stand virtually in the same position, namely, that the plaintiff having stated, and these defendants having admitted generally, a case which warrants a decree against

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all parties before the court; but having mutually left in the dark the particulars which it is necessary to ascertain, in order to determine the priority of the different claimants, and consequently the precise form of the decree, these matters must be the subject of an enquiry before the master. The same remark applies to the mortgagor, *Caulcutt*. The defendants, who have answered, all admit the title of the plaintiff as the first incumbrancer. The defendant *Weller* admits all the other mortgages, and claims priority over *Delaney* and *Burns*, notwithstanding their prior supposed registration, on the ground of notice. He does not, however, admit the fact of their prior registration, nor does he admit any of the judgments, or the transfer of *Goodeve* and *Corrigal's* mortgage to the *Bank of Montreal*. It seems to us that these matters must be the subject of enquiry before the master. The decree must be interlocutory, to settle the priorities of the different claimants upon the equity of redemption, as the court must name the different parties who are to redeem in the order in which they are entitled to exercise that right, which it cannot do until the priorities are determined; and other facts also must be ascertained, before a final decree can be pronounced. The statements of all parties are so general and vague, that it does not appear what estates they or any of them respectively have; nor whether their respective mortgages include the whole or only part, or what part, of the mortgaged lands. The order *pro confesso* against the *Bank of Montreal*, is irregular; but they have appeared at the hearing, and waived the objection, which it is competent for them to do.

Judgment.

Two questions were raised at the hearing; one, whether a sale could be decreed? the other, whether the defendant *Weller* was or not entitled to priority over the defendants *Delaney* and *Burns*? With respect to the first point, the difficulty arises from the absence of certain of the parties. Those who are before the court, consent; and if they were all before the court and consented, no difficulty would exist. It has been already mentioned, that the bill prays a foreclosure; and the question is, whether, when the bill prays a foreclosure, and all the parties are not before the court to

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It was indeed insisted, that, as the bill was taken *pro confesso* against the absent defendants, a decree for a sale might be made on that account.

Judgment.

For this position, only one case was cited, namely, *Dashwood v. Bithazey* (a); but this authority is not, we think, sufficient to warrant the adoption of the proposed course on the present occasion. In the first place, Mosely's Reports are not of very high authority; in the next, the case is inconsistent with itself, inasmuch as the Master of the Rolls, after stating that where the security was defective, the proper course was, not to decree a sale, but a valuation of the estate, and an assumption of it by the mortgagee, at the value thereby fixed, adds, that nevertheless, because the bill was taken *pro confesso*, a sale should be decreed: whereas, if the circumstance of the bill having been taken *pro confesso* is to release the court from all obligation to regard the particular form of the prayer, it cannot warrant it in pronouncing any decree which it does not think right. Mr. *Coventry's* edition of Powell on Mortgages, 963 & 1016, and Coote on Mortgages, 513, were also cited in support of this view; but as they merely cite the case in Mosely, they carry the matter no further than that case did. For our own part, we do not think that reason sanctions the rule laid down in *Dashwood v. Bithazey*, even to the extent to which it is in terms there stated. We should say, that if a bill be taken *pro confesso* against a defendant, the court may decree against such defendant whatever it deems right—with reference, however, to the pleadings and the form of the prayer. But supposing that where a defendant has stood out all process of contempt to a sequestration, and the bill is on that account taken *pro confesso* against him, (and to such a case only the authority relied upon applies,) he is to be considered as having forfeited privileges to which he would be otherwise entitled, and becomes liable to any decree which the facts stated in the bill may warrant, without regard to the form of the prayer. We would hesitate to apply such

(a) Mos. 196.

a rule to persons standing in the situation of these absent defendants, who are not in contempt at all, against whom the suit has been brought to a hearing in a summary and inexpensive manner only, and who cannot be considered as having forfeited any privileges which they ever had. The question, then, resolves itself into the broad one of, whether a sale can be decreed when the bill prays a foreclosure, supposing the plaintiff to be entitled, as against the absent defendants, to any decree which he may have, without the consent of parties, upon the bill, framed as it is.

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The cases cited in support of the position, that a sale may be decreed upon a bill praying a foreclosure, are *Earl of Kinnoul v. Money*, (a) and *Hiern v. Mill*. (b) In *Kinnoul v. Money*, the lands were the wife's and stood settled, subject to the mortgage, on the husband (the plaintiff) for life, with remainder to the defendant *Money*. The husband filed his bill to have the estate sold and the mortgage discharged. The mortgagees resisted a sale, and it was held that the tenant for life was not entitled to demand it. Part of the money the husband was liable to pay himself, it having been raised for his benefit; the rest was chargeable on the estate; and the remainder man being willing to raise his portion of the money, it was held that the plaintiff could have a decree for redemption. It does not appear that the mortgagees made any objection; and the point which arises in this case was not argued. Lord *Hardwicke*, however, lays down the rule broadly, and the case therefore is an authority, to a certain extent, that upon a prayer for sale, a redemption may be decreed. *Heirn v. Mill*, which was treated in the argument as a clear authority for what was asked, is, we think, rather an authority the other way. There the plaintiff was an equitable mortgagee, and filed his bill against the mortgagor and a purchaser from him, with notice, as he alleged and proved, praying payment, or in default a conveyance. This relief, however, was prayed only against the mortgagor, and not against the co-defendant, the purchaser; and it was held that under the

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(a) 3 Swans. 202, note.

(b) 13 Ves. 114.

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general prayer, the same relief as was prayed against the mortgagor, might he had against the purchaser. This involved no inconsistency, and the manner in which Lord *Erskine* lays down the abstract rule, is, in our opinion, adverse to the claim advanced in the present instance. On the other hand, we have *Nosworthy v. Maynard*, mentioned in *Dashwood v. Bithazey*, where the cause stood over to give an opportunity of filing a supplemental bill, in order to have a sale when the security was defective, and the original bill prayed a foreclosure; *Beaumont v. Boulton*, mentioned in *Palk v. Clinton*, where the bill is stated to have been amended for the same purpose, although as reported in 5 Vesey. 485, and 7 Vesey. 589, it is not in point; *Palk v. Clinton*, (a) where Sir *William Grant* entertained doubt, and pronounced no opinion whether the foreclosure could be had on a bill praying only a sale, and the order actually made gave the plaintiff liberty to amend his prayer, and *Martyn v. Cook*, (b) before Lord *Hardwicke*, where the cause stood over, apparently to enable the plaintiff to amend by striking out the specific prayer. We have also consulted the cases of *Wilkinson v. Beal*; (c) *Grimes v. French*; (d) *Dormer v. Fortescue*; (e) *Manaton v. Mollesworth*; (f) *Topham v. Constantine*; (g) *Weymouth v. Boyer*; (h) *Mills ex parte Mills*; (i) Lord *Walpole v. Lord Orford*; (j) *Bennet v. Vade*; (k) Cooper's Equity pleadings, 14; Mitford, 38; Story's Equity Pleading, secs. 40, 1, and 2.

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Thus the matter stands upon authority, as far as we have been able to find it; and under such circumstances it would, no doubt, be safer for us to adhere to the terms of the prayer, which cannot be wrong, than to decree a sale in opposition to the doubts expressed by Sir *William Grant* in *Palk v. Clinton*. Reason and common sense point, we think, to the same course. A sale is a very different thing, in effect, from a foreclosure. In case of a sale, the pro-

(a) 12 Ves. 48.

(d) 2 Atk. 141.

(g) Tam. 135.

(j) 3 Ves. 416.

(b) 2 Atk. 2.

(e) 3 Atk. 132.

(h) 1 Ves. jr. 416.

(k) 2 Atk. 325.

(c) 4 Madd. 408.

(f) 1 Eden. 26.

(i) 2 Ves. 299.

ceeds would be absorbed by the earlier incumbrances, while, if a foreclosure were decreed, the parties claiming these incumbrances might not be able to redeem, and the opportunity of doing so might come to the subsequent incumbrancers.

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We think, therefore, that the decree in this case must be for foreclosure, unless the consent of the absent parties to a sale can be obtained before a final decree is pronounced; for as we have already observed, the decree in the first instance must be interlocutory. It might have been absolute had a sale been decreed, as the master might have been directed to ascertain the priorities, and to apply the proceeds of the sale accordingly; but this will not preclude the court from directing a sale at the hearing, upon further directions, should the consent of the requisite parties be obtained in the meantime. Under these circumstances, it has not been necessary for us to consider whether a mortgagee, when he prays a sale, can have it, when the subsequent incumbrancers, or the mortgagor, do not consent.

Judgment.

The other point was raised by the defendant *Weller*, who contends, that if the mortgages of *Delaney* and *Burns* were really registered before his own, but they had notice of his mortgage at the time they advanced their money, they must be postponed. Upon consulting the English Registry Acts and our own, together with the cases which have been cited on this point, we think he is right in both the positions that he assumes, namely, that as between equitable incumbrances priority may be gained by means of prior registration, but that the effect of such prior registration will be defeated by notice. If the statute 9 Victoria, chapter 34, were designed to prevent tacking, it has only a very partial operation in that respect. It contains no such clause as occurs in the Irish act, (a) and which produced that effect in Ireland. Even the Irish act, however, does not exclude the effect of notice. The result is, that in Ireland a subsequent registered incumbrance cannot be added to a prior one, to the prejudice of mesne registered incumbrancers, unless they had

1849. notice. Under our own act, it would appear that tacking is prevented in a less degree than it is in Ireland. If the object of our legislature were to prevent tacking altogether, it would be better to copy the clause in question in the Irish act, which, it is believed, is found to operate beneficially in Ireland. Registration is not deemed to be notice in Ireland; nor is it necessary for any purpose to hold such a doctrine, which may be productive of mischievous consequences. In the present case, however, a consideration of this point seems to us unnecessary. *Weller's* mortgage is prior in point of date to those over which he claims priority. He is therefore *prima facie* to be preferred, unless they raise some objection to it which they do not; and although he has unnecessarily raised the question himself, we do not think he is thereby to be prejudiced. The same defendant objected, by his counsel, at the hearing, because all the incumbrancers were not before the court. He has not, however, proved that any other incumbrances existed, and therefore his objection must be overruled. The master must enquire and state what estates the different defendants, the mortgagees, took in the mortgaged premises; and whether all or how much of the mortgaged premises were included in their respective mortgages. He must also enquire when the different judgments were registered, as judgments bind the lands from the time of registration. They do not, however, by means of prior registration, acquire priority over previous unregistered deeds. The defendants, *Goodeve* and *Corrigal*, whose mortgage embraces only part of the lands comprised in that of the plaintiff, claim, that the estates shall be marshalled, and a sale decreed, in order to give effect to that privilege. Should a sale be decreed, these defendants will be entitled to what they ask; but it would be too much to decree a sale, if not otherwise proper, in order that they may have it. The master must enquire as to the fact of the transfer of *Goodeve* and *Corrigal's* mortgage to the *Bank of Montreal*, which is not admitted by *Weller*. The parties, whether absent or present, must have notice to attend the different enquiries in which they are interested.

Bethune
v.
Caulcutt.

Judgment.

The following is a copy of the minutes of the decree, 1849.
handed to the registrar by the court :—

Declare, that the plaintiff is first mortgagee of the hereditaments in the pleadings mentioned, and is entitled to be redeemed by the defendants, or to foreclose them.

Declare that the defendants—other than the defendant *Caulcutt*—are subsequent incumbrancers upon the said hereditaments, and are entitled to redeem the same according to their respective priorities.

Declare, that the defendants, the mortgagees, are entitled to redeem the said hereditaments, in the order of the dates of their respective mortgages.

Declare, that if any defendant or defendants, being a judgment creditor or judgment creditors, have registered their or his judgment or respective judgments, before any deed or deeds of any of the defendants (the mortgagees) which were prior in point of date to such judgment or judgments, the same judgment or judgments did not thereby acquire any priority over such deed or deeds.

Refer it to the master, regard being had to the foregoing declarations and the other circumstances of the case, to settle the priorities of the different defendants.

Refer it to the master, to receive proof of any judgment or judgments of any defendant or defendants, which may have been prior to the mortgage of the defendant *Weller*; and of the transfer of the mortgage of the defendants *Goodeve* and *Corrigal* to the defendant the *Bank of Montreal*, as against the defendant *Weller*, unless he shall admit the same.

Refer it to the master, to enquire and state to the court what estates the different defendants, the mortgagees, took in the mortgaged premises; and whether the whole or what part of the same premises was included in their respective mortgages.

Reserve the consideration of further directions and of costs, until after the master shall have made his report.

The master to report special circumstances; all parties to be at liberty to apply, as there may be occasion.

Bethune
v.
Caulcutt.

Judgment.

1850.

January 22.

RE McDONALD,

RE TAYLOR.

Practice—Infants—Provincial statute 12 Victoria, ch. 72.

In the matter of *McDonald*, Mr. *Gwynne* presented the petition of *James McDonald*, by his mother, (who acted as his guardian,) stating that the petitioner's father died in 1839, intestate, who, at the time of his death, was possessed of a very little personal property, and several lots of land in this province—leaving the petitioner (then six years of age) and three other infant children, together with their mother, who had since taken out letters of administration—him surviving; that at the time of his death, the intestate owed several small debts, and that all the personal estate had been expended in satisfying funeral expenses and debts; and that by her own labour, and by loans of money, his mother had since that time maintained herself and children, but that owing

Statement. to the increased demand for their support, she was now unable to do so; the petition further stated, that part of the lands had been sold for taxes, and that the residue was now liable to be sold, in like manner, at a great loss, and that it would be for the benefit of the petitioner that a sufficient sum should be raised by the sale of the residue of the lands, or a portion thereof under the direction of the court, for the purpose of paying the arrears of taxes, and indemnifying his mother for the amount expended by her in supporting the petitioner; and that provision should be made for the future support of the petitioner—and prayed that the lands remaining unsold might be disposed of by and under the direction of the court, pursuant to the statute, a sufficient sum set apart for the support and education of the petitioner, and for payment of the taxes; and that a sufficient sum might also be set apart for his mother, to compensate for her claim to dower in the premises.

By the order made on this petition, it was referred to the master to enquire into the truth of the petition, and what personal estate *Peter McDonald* died possessed of, and what

real estate he was seised of; the present condition thereof; 1850.
 if likely to increase in value; and what would be the most
 advantageous mode of disposing thereof, whether by sale Re M'Donald
Re Taylor.
 or otherwise, for payment of taxes, maintenance and educa-
 tion of the petitioner; also, as to the ability of his mother
 to support herself and children; also the age of the peti-
 tioner, and if expedient to apprentice him; and if for the
 benefit of petitioner, to sell part of the estate. The master
 to state to the court the grounds of his opinion, and what
 would be a proper annual sum to allow for the maintenance
 and education of petitioner, and to ascertain if petition
 presented with consent of petitioner, for which purpose he is
 to be examined personally, and in private if possible; but if
 impracticable, then the master to receive such other proof
 thereof as he shall deem proper, and report same to the
 court, &c.

In the matter of *Taylor*, Mr. *Burns* presented the petition
 of *A. Taylor*, the father and guardian of *J. I. Taylor*, and
A. Taylor, stating that *John I. Taylor*, of Nelson, deceased, Statement.
 had devised 45 acres of land in that township (on which was
 erected a saw-mill) to the petitioner for life—remainder to
 his said two sons, who were respectively of the age of
 nineteen and seventeen years. That in consequence of the
 want of sufficient capital to put up a proper mill on the
 premises, the same had become worthless to the petitioner.
 The mill once erected thereon had become dilapidated and
 ruinous, and by reason of the want of means, the petitioner
 had not kept the same in repair. The petitioner further
 alleged that he was unwilling to spend money, even if he
 had it, upon the premises, having a life estate therein
 only, that he was unable to sell or dispose of his interest,
 without the infants joining with him in conveying the fee
 simple, and that it would be greatly for the advantage and
 benefit of the infants, if the premises could be sold and dis-
 posed of at once, and the proceeds invested for their use
 until they should attain the age of twenty-one. And which
 sale the petitioner expressed his willingness to consent to on
 having a proper allowance made from the purchase money to
 him, for his interest in the premises.

1850. The infants had given their consent in writing to the sale taking place as asked for.

Re M'Donald
Re Taylor.

The court refused to make any order in the matter; the whole appearing to be for the benefit more of the father than of the children, neither of whom was of such an age as to stand in need of any aid or assistance, other than what the father could conveniently afford them.

HERCHMER V. BENSON.

Practice—Pro confesso.

Where plaintiff had obtained an order to take the bill *pro confesso* against one of the defendants, and afterwards applied to amend by adding parties, without prejudice to the order to take the bill *pro confesso*—motion refused.

Mr. *Mowat*, in this case, had moved for leave to amend the bill, without prejudice to an order which had been obtained, to take the bill *pro confesso*, as against one of the defendants.

No authority cited for the motion being granted.

Judgment. THE CHANCELLOR.—We have considered the motion made in this case on Friday, and are of opinion that we cannot properly make the order asked. It is a general rule, that any amendment of the bill opens the case to all parties; and there can be no reason for saying that a defendant who has allowed the original bill to be taken against him *pro confesso*, should be precluded from making any defence he may have to the amended bill. The question is, what is the record that should be taken *pro confesso*? Certainly not the amended, but the original bill, to which, perhaps, this defendant may have had no defence to make; but the court from that circumstance, are not to presume that he will not be desirous of making a defence to the amended bill.

Mr. *Mowat* asked what course he should take under the circumstances, and if it would be necessary for him to reserve the subpoena?

THE CHANCELLOR thought it would.

1850.

Nov. 16, 1849,
Jan. 8, 1850.

FARQUHARSON V. WILLIAMSON.

Practice—Specific performance—Agent.

A., by power of attorney, authorised his wife to sell and convey certain lands, upon such terms as she should deem suitable and convenient; and immediately afterwards left the province, and died abroad. The wife employed B. to find a purchaser, who accordingly agreed with the plaintiff for a sale at a certain price, payable by instalments, with interest; upon payment whereof he was to receive a conveyance; and B. gave *his own bond* for a deed, in which were contained the terms and conditions of sale. The wife subsequently approved of and ratified the bargain so made; and B., with her consent, let the purchaser into possession of the property bargained for. Upon a bill being filed for specific performance of the contract, *Held*, that this was not a contract *in writing*, within the meaning of the Statute of Frauds; but that sufficient appeared to authorise the court to decree a specific performance of a *parol* contract upon the terms of the bond, as being partly performed, and within the terms of the authority. Where a bill was filed against the heir at law, for specific performance of a contract entered into by the ancestor, stating that all the purchase money had been paid, but this was not altogether proved at the hearing; the court directed a reference to the master, to receive proof of payment of the purchase money; reserving leave to the personal representative to apply in case any part of the purchase money remained unpaid at the time of the decease of the ancestor.

Where an agent is empowered, not merely to sell, but to "sell and convey," authority to receive payment of the purchase money is implied.

The facts are set forth in the judgment of the court.

Mr. *Brough*, for the plaintiff, cited 2 B. & P. 438; 3 Bing. N. C. 817; 3 Atk. 503; and submitted, that under the circumstances appearing, it must be considered that the plaintiff had entered into the contract with the ancestor, and that he had done every thing in his power to obtain the conveyance without resorting to the expense of a suit: that the evidence established the case made by the bill; and if the court should be of opinion that there was not a contract in writing, sufficient appeared to authorise the court in decreeing a specific performance of a *parol* contract, partly performed on the terms set forth in the bond. The estate being small, and the plaintiff desiring to obtain his rights at as little expense as possible, he submitted the court would not compel the plaintiff to amend, by making the personal representative a party; but would, if possible, in conformity with the rules of the court, grant him the relief sought.

Mr. *Mowat*, for the defendant.—The suit is in the nature of a friendly one, all parties interested being willing that the plaintiff should succeed in obtaining a decree, if entitled.

Statement.

1850. My instructions are, to create no unnecessary expense or delay; I commit, therefore, the rights of my client to the care of the court.

Farquhar's'n
v.
Williamson.

January 8th.—Judgment was delivered by—

Judgment.

THE CHANCELLOR.—The facts of this case are, that *Benjamin Williamson* being seised in fee of an undivided moiety in the east half of lot No. 26, in the 3rd concession of Whitby, subject to a mortgage upon the whole lot, gave a power of attorney to his wife, to dispose of it in fee simple for such price as she should deem suitable and convenient, and to execute for that purpose all such conveyances, with such covenants, &c., as she should think fit. After executing this power of attorney, *Benjamin Williamson* departed this province for the United States, where he remained until his death, which it is stated happened in 1839 or 1840. In 1836, the plaintiff entered into a contract with the wife, as the attorney of her husband, and with *David Williamson*, the other joint owner, for the purchase of the entirety of seventy-four and three-quarters acres of the lot, for the sum of £224 12s., for which he gave his promissory notes. A written instrument, in the form of a bond, with a condition, was upon this occasion signed by *David Williamson* and *William Ousten*, the father of the wife, through whose instrumentality the contract was entered into on her part. The purchaser was let into possession, and he paid his purchase money, half to *David Williamson*, and the other half to *William Ousten*, who paid about half of it to the wife. No conveyance has been executed, and the object of the bill is to obtain a specific performance of the contract as to *Benjamin Williamson's* share; *David Williamson* having, as it is stated at the bar, long ago conveyed his moiety to the plaintiff, in pursuance of the agreement.

The evidence, which squares sufficiently with the statement of the case in the bill, shews the execution of the power of attorney and the bond; the assumption of possession by the purchaser, in pursuance of the contract, with the wife's consent; and the payment of the purchase money, in the manner above mentioned. It also shews the death of *Benjamin Williamson*; and that the defendant against

whom the suit is instituted, as his heir at law, is his only child by her mother. 1850.

The questions raised in the course of the argument were, whether a written contract existed in this case, or a parol contract, partly performed, so as to except the case from the operation of the statute; and whether the money, or any part of it, was effectually paid. Other questions also presented themselves, in the consideration of the case. The opinion which we have formed upon the whole matter, with reference to the authorities which were cited in the course of the argument, and such as we have been able to discover upon the subject, is, that no written contract is shewn, within the Statute of Frauds, as regards *Benjamin Williamson's* share; but that a parol contract, upon the terms of the alleged written contract, is shewn, together with a part performance of it, sufficient to exclude the operation of the statute. We think also, that although the bill does not expressly represent the case as one of a parol contract partly performed, yet, as it states facts which constitute such a case, and does not represent the case in a different or inconsistent light, it is sufficient. We think, moreover, upon all the circumstances of the case, and in the absence of direct authority upon the point, that the attorney had power to enter into a contract upon time, and was not limited to a sale for cash; and that a sale for a certain price, payable by instalments, with interest—the conveyance being withheld until payment of the purchase money—was within the limits of her authority. The delivery of promissory notes was not good payment; but as they did not lessen the security on the land, which existed independently of them, they could not vitiate what was sufficient of itself.

Farquhars'n
v.
Williamson.

Judgment.

We think also that Mrs. *Williamson* had authority to receive the purchase money. It is clear that a power to sell merely, does not authorise the receipt of the purchase money. But we have seen no case of a power to sell and convey; and in the absence of authority on this point, we are of opinion that it authorises the receipt of the money. So far, therefore, as the money actually came into the hands

1850. of the attorney, it appears to have been well paid, if paid in *Benjamin Williamson's* lifetime. But the residue retained by *Ousten* has never been paid effectually. Mrs. *Williamson* held the money, when received, for her husband's use; and her acquiescence is of no avail, since she could not sanction the payment of it to *Ousten*. Actual payment to her was necessary, to exonerate the purchaser; and although probably a payment so made would not have been invalidated even by actual notice that she intended to dispose of the money, when received, in an unauthorised manner, yet the purchaser could not be a party himself to any misapplication of it, and could not therefore by her direction pay it to *Ousten*. The part, therefore, not paid to Mrs. *Williamson*, must be paid, with interest; and the administrator of *Benjamin Williamson* is, in strictness, a necessary party, in order to receive it. It is not shewn when the part received by Mrs. *Williamson* was so received, and in this respect the evidence seems defective. It is to be presumed, we think, that *Benjamin Williamson* was alive at the time of the making the contract. With regard to the manner in which the contract was entered into, it may be proper to remark, that we consider Mrs. *Williamson's* subsequent ratification of her father's proceedings, both expressly and by her acquiescence, with full knowledge of all that occurred, an adoption of his act; and that it amounted to the making of a parol contract with the purchaser, upon the terms of the written agreement; and therefore the statement in the bill, that the plaintiff contracted with *Benjamin Williamson*, through his agent, upon the terms of the bond—which we think is the effect of what is stated—is fully sustained by the evidence. The cause, in strictness, should stand over, with liberty to the plaintiff to amend his bill by making the administrator of *Benjamin Williamson* a party; and, under the circumstances of the case, we see no objection to his producing evidence for the purpose of proving the time of the payments to Mrs. *Williamson*. Although it was intimated in the course of the argument, that no opposition was offered to the suit, we thought it our duty, as an infant was concerned, to look

Farquhars'n
v.
Williamson.

Judgment.

into the case as closely as if it had been contested, but at 1850.
 the same time with the greatest desire to afford the plaintiff, ^{Farquhars'n}
 who is admitted to have acted with perfect good faith, every ^{v.}
 facility for amending any accidental defects in his record. ^{Williamson.}
 We should add, that the proof of the heirship of the defend-
 ant is defective, as it does not shew that *Benjamin*
Williamson had no other child by another wife. This
 defect may also be supplied. Our extreme desire to afford
 every opportunity to a plaintiff whose case appears to be
 just, has induced us perhaps to relax the strict rule of prac-
 tice upon this occasion. We think that the necessity of
 making the administrator a party may be obviated, and that
 liberty may be reserved to him to apply, in case any part of
 the purchase money should remain unpaid, and should be
 secured in court. (a) We propose, also, a reference to the
 master, to receive proof of the payment of the money; so that
 if it should appear that the amount paid to *Ousten*, and
 retained by him, ought to be allowed, the plaintiff may have
 the full benefit of it. At the same time, proof may be offered
 of the time when the money was paid; so that it may be
 shewn, if such were the fact, that it was paid in the lifetime
 of *Benjamin Williamson*: and it may also be proved that
Benjamin Williamson had no other child by any other wife.
 Further directions, and the consideration of costs, will be
 reserved.

Judgment.

The question, whether the infant can be ordered to convey,
 or whether the conveyance must be respited until she
 attain twenty-one, will be determined when the cause is
 again brought to a hearing.

The following are the minutes of the decree drawn up in
 this case:—

Refer it to the master, to enquire and state to the court to
 whom the promissory notes mentioned in the pleadings
 were given, and to whom or to whose order they were pay-
 able, and what became thereof, and to whom the same were
 paid, and to whom the purchase money in the pleadings
 mentioned was paid, and when in particular the same and
 every part thereof was paid, and whether or not in the life-

(a) Orrok v. Binney, Jac. 523.

1850. time of *Benjamin Williamson* in the pleadings named, and how much thereof came to the hands of *Jane*, the wife of *John Sutherland*, and the mother of the defendant.—
 Farquhar's v. Williamson. Let the master also enquire and state whether the said *Benjamin Williamson* had any other child than the defendant, and who was his heir-at-law. Reserve further directions and costs. The master to report any special circumstances, and all parties to be at liberty to apply.

BUCHANAN V. TIFFANY.
 LAWRASON V. MAGINN.
 THOMPSON V. JOHNSON.

Practice—75th order.

Where the plaintiff had proceeded under the 75th order of this court, had obtained a decree *pro confesso*, and the master's report; all the proceedings taken in the master's office having been *ex parte* and without any notice served on the defendant, the court refused to confirm the master's report absolutely in the first instance, notwithstanding that it had been the constant practice of the court to do so, ever since the making of the order referred to.

ESTEN, V. C., *dissentiente*.

In these cases motions had been made on a former day, as of course, for orders absolute in the first instance, to confirm the master's report. The subpœna had been served under the 75th order of this court, (passed 20th April 1840.) In each case the bill was for the foreclosure of a mortgage, and—the defendant not appearing—was taken *pro confesso*, and the usual decree of foreclosure made. It appeared by the usual recital in the master's report under this decree, that the proceedings in his office had been *ex parte*. The court intimated much doubt of the correctness of this course, and directed the matter to be argued. The motions were in consequence now renewed. Mr. Mowat, for the plaintiffs in the two first-named cases, cited 2 Smith's Practice, 360; *Heyn v. Heyn*, (a). Under the mortgage orders (28th June, 1845) prepared by the commission, the only proceedings to be served are two, viz.:—the subpœna and one warrant; since the court can dispense with service of all but two, it may with all but one—the subpœna. The invariable practice under the 75th order has been to proceed *ex parte* after subpœna is served, if, as here, the defendants do not

appear; and practice is sufficient in all courts to make 1850.
a rule or abrogate or vary one. See *Bewdley's case*, (a) *Combe*
v. Cuttiti, (b) *Brown v. Bruce*, (c) *Boehm v. De Tastet*. (d)
The Vice-Chancellor who made the order, and was therefore
the best interpreter of its meaning, has been in the invariable
habit of granting the application now made; so that the
practice must be considered as authoritatively and conclu-
sively settled. This practice is not known to have, or
charged with having, in any one instance worked hardship;
while to declare it invalid would re-open all proceedings
taken and completed under it, though much property has
changed hands, and many transactions have taken place,
relying on the correctness of such proceedings. Again, the
75th order itself contemplated the service of no proceedings
after *supœna*; for it directs that on the default of the
defendants, appearances may be entered for them, the bill
taken *pro confesso*, and a decree made *and enforced* against
them accordingly. Most, and probably all, cases under
the order, have been for foreclosure of mortgages, and the
reference in such cases is merely for convenience of the
court, and might otherwise be dispensed with; it directs
the master to compute the interest, which hardly requires
the defendant's presence; and to tax the costs, which, until
lately, might generally be done without notice in the
common law courts. There is less chance of part payments
having been made beyond what plaintiffs admit, than in
those numerous cases at common law in which judgments
for want of a plea are final in the first instance.—2 Arch. Pr.
8th ed. 903. Plaintiffs in equity have, before report, to
make affidavit of their receipts; in the cases referred to the
only notice defendants received of proceedings in district
court suits under 2 IV Geo., ch. 2, was the first process—
the summons.

Buchanan
v.
Tiffany.

Statement.

THE CHANCELLOR.—This is a bill of foreclosure. The
plaintiff proceeded under the 75th order, entered appearance
for the defendant, procured a decree to be drawn up founded
upon an order to have the bill taken *pro confesso*, proceeded
in the master's office without any notice to the defendant,

(a) 1 P. W. 223.
(c) 2 Mer. 1.

(b) 3 Bing. 163.
(d) 1 V. & B. 327.

1850. and now asks to have the master's report confirmed in the first instance, instead of proceeding by order *nisi* according to the usual practice, or under the 162nd order of 1845.

Tiffany
v.
Buchanan.

The plaintiff's counsel submits, that his application is in accordance with the uniform practice of the court, since the publication of the order in question, and the master has corroborated this statement of the plaintiff's counsel in regard to the practice, but he at the same time informed us that he only sanctioned its adoption, because he believed it to be in accordance with English rule.

Judgment.

I am of opinion, that the practice in question is not sanctioned by English precedent; but before examining the passages which have been relied upon as establishing it, I think it important to observe, that prior to the 5th of Geo. II., an appearance by the defendant was indispensable. That it was which conferred upon the court jurisdiction, and until enforced, the plaintiff was of consequence remediless. Mr. *Smith* says, in the first volume of his *Chancery Practice*, at page 152, "*Before the passing of Geo. II., ch. 25, an appearance by the defendant was considered essential to confer jurisdiction on the court, and where that could not be enforced, the court possessed no power of relieving.*"—And a little farther on, after again adverting to the necessity of an appearance, and the increased facility afforded by the statute, which enabled the plaintiff to obtain a degree upon the bill taken *pro confesso*, he adds—"This power was first conferred upon the court by 5 Geo. II., ch. 25."

When then, we turn to the passage of Mr. *Smith's* book, (a) relied upon as authorising this *ex parte* proceeding, we think it abundantly evident that the author's meaning has been misconceived. He says,—“If the bill has been taken *pro confesso* for want of the appearance of the defendant, the report may be confirmed absolutely in the first instance, there being neither party nor clerk in court on whom service can be made.” Now, whether we look to the cases embraced within the rule so enunciated, or consider the reason of that rule, I think it equally clear that it cannot govern the present application. The rule in terms only

applies where the bill has been taken *pro confesso* for want of appearance, but that can only be under the statute of Geo. II., or those subsequent ones, by which it has been re-enacted and extended. It cannot include those cases where a bill has been taken *pro confesso* after an appearance entered for the defendant by the plaintiff, for that power was first conferred by 1st Will. IV., ch. 36, and that statute expressly gives to an appearance so entered the same effect as if entered by the defendant, and then permits the bill to be taken *pro confesso*, not for want of appearance, but for want of answer. This conclusion is no less clear from the reason of the rule. The plaintiffs may proceed in the master's office without notice to the defendant—not where there is no *solicitor* to be served, (which would include the case we are now considering,) but where there is neither party nor *solicitor*, which is true, indeed, where you proceed against an absconding defendant under the statute, but it is not true where the party has been served with process, and, although he has not appeared, may with equal facility be served with the master's warrant. The same reasoning applies to Mr. Daniel's statement of the practice found in the second volume of his book, page 805. But the meaning of the statement adverted to, would seem to be placed beyond controversy, by reference to the date of the decision to which they both refer. (a) That cause was determined in 1823, several years prior to 1st Will. IV., which, for the first time, enabled the plaintiff to enter an appearance for the defendant.

1850.

Buchanan
v.
Tiffany.

Judgment.

Is there then any thing in the nature of a decree, founded upon an order to take a bill *pro confesso*, which should entitle the plaintiff to proceed in the master's office under such a decree without notice? We think clearly not, and *King v. Bryant*, (b) and *Parry v. Perryman*, (c) are directly in point. The last is peculiarly valuable, because there the master's report was taken off the file, although no person appeared for the defendant. It may be said that, in the case cited, the defendant had appeared. The observation seems

(a) Thomson v. Trotter (cited) 3 M. & C. 193. (b) 3 M. & C. 191.

(c) 2 Dan. Chan. Prac. 805.

1850. to us to render their authority the more binding. If it would be unjust to permit the account to be taken in the absence of the defendant, who, having appeared, had been proceeded against by process to compel an answer, and who must in that way have had his attention repeatedly called to the progress of the cause, *a fortiori* would such a course be unjust toward one who has had no intimation of the progress of the suit, except by service of the subpoena.

Buchanan
v.
Tiffany.

Is there any thing then in the 75th order to warrant the practice which is said to have sprung up? The order may be capable of the construction contended for; but we are of opinion that it would be at variance with the true interpretation. That order, after empowering the plaintiff to enter appearance for the defendant, goes on to provide, that unless the defendant *answers* the bill within the time limited, it may be ordered to be taken *pro confesso*, and a decree made and enforced against the defendant *accordingly*. Here the bill is taken *pro confesso*, not for want of *appearance*, but for want of *answer*; and the phraseology is the more significant because, by the 63rd order, the bill is taken *pro confesso* for want of *appearance*, according to the practice introduced by the 5th Geo. II., while the 75th order is framed in accordance with the provisions of the statute of Will. IV.

Judgment.

But it is argued that no notice can be required in this case, because the order provides, that in case of default, a decree is to be made and *enforced* against a defendant *accordingly*, and therefore to require further notice would be to defeat the order. I cannot agree in that construction. If the word “*accordingly*” import any thing, then it means, we presume, that a decree will be made and enforced according to the practice in such cases; but we have seen that the practice in such cases is not to proceed *ex parte*, but upon notice. If, on the other hand, the term *accordingly* is to be regarded as redundant, then I would consider it as a most unwarrantable construction of the order, to hold the plaintiff as not only entitled to a decree upon the bill as confessed, but further to proceed in all enquiries directed by such decree, without notice to the defendant. The order

confers upon the complainant a very important privilege, by enabling him to obtain a decree without delay or expense ; and where a perfect decree can be pronounced in the first instance, the defendant is of necessity concluded, and such decree may be enforced ; but where ulterior enquiries are necessary, the law knows no mode of enforcing such decree except through the medium of a reference to the master, of which the defendant must have notice. I am of opinion that this interpretation of the term referred to, is consistent with reason, and borne out by the provision to be found in the English order of 1845. There the defendant is notified that unless he appears and answers the bill, *he will be subject to have such decree made against him as to the court may seem just, on the plaintiff's own shewing ;* and yet those same orders contain the most careful provision for ensuring the defendant notice whenever that is possible before such a decree can be obtained ; and where notice cannot be served, the decree remains open for three years.

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v.
Tiffany.

Judgment.

The course of proceeding in courts of common law, does, in my judgment, afford a strong analogy for the conclusion at which I have arrived. There, judgment for want of a plea, is conclusive where no further investigation is required, and may be at once enforced by execution ; but where any account is to be taken, or damages assessed, the defendant must have notice of such assessment.

On the whole, considering the slow steps by which this practice has been introduced in England, the frequent legislative interpositions which have been considered necessary, and the careful provisions in the order of 1845, by which the courts there have guarded against the possibility of adjudicating upon property in the absence of those interested,—I feel that we could not place upon the 75th order the construction sought to be put upon it, with any thing *like a due regard to the due protection of the rights of parties*, to use the language of the order itself.

In coming to this conclusion, I do not mean to decide any thing in relation to the cases already perfected by decree. I determine nothing as to the effect which the practice of

1850. the court or the laches of the parties may have in such cases. I leave those matters to be disposed of when they arise; but I have seen no decision which could warrant us in this case, not perfected by decree, but now in actual progress, in permitting accounts to be taken in the absence of the party interested, contrary to what I consider the true construction of a rule of court.

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This account must therefore be referred back to the master, as was done by the Master of the Rolls, in *Parry v. Perryman*; and we shall direct, that for the future, in all suits prosecuted under the 76th or 178th order, the defendant should be entitled to notice, as provided under the orders respecting foreclosure suits; and the master shall have the same discretionary power therein, in relation to warrants.

We are all of opinion further, that the 63rd order should be abrogated; but we forbear to assign our reasons until the determination of a cause prosecuted under that order, now pending before us.—See *Cooper v. Lewis*, (a) *Cartwright v. Smith*. (b)

Judgment.

JAMESON, V. C.—Concurred in the views expressed by his lordship the Chancellor.

ESTEN, V. C.—I think the meaning of the 75th order, as to the service of warrants, doubtful; but it appears to me that an uniform practice of eight years should be considered as settling the construction of the order in this respect, and should not be disturbed,—*Bewdley's* case shews the effect of an uniform practice.

Independently of this consideration, it appears from the cases *Brown v. Bruce*, and *Boehm v. DeTastet*, that an ancient and uniform practice is equivalent to a written order, and will have the effect of abrogating or varying a written order, so that even if it were clear that the 75th order contemplated service of warrants, it might be deemed that the practice had been altered in that respect. I think, therefore, that in the cases of *Lawrason v. McGinn*, *Buchanan v. Tiffany*, and *Thomson v. Johnson*, the orders asked for should be granted.

Per Cur.—Order to confirm refused, and report referred back to the master.

ESTEN, V. C., *dissentiente*.

(a) 2 Phil. 178.

(b) 6 Beav. 121.

1850.

WALSH V. BOURKE.

Practice—175th order—Confirming master's report.

A plaintiff had proceeded to foreclose a mortgage and had procured a decree to be drawn up in the absence of the defendant, who further neglected to attend in the master's office; having obtained the master's report, the plaintiff applied to confirm the master's report in the first instance. The court refused the application, notwithstanding that practice had been pursued under this order since the time it was made.

ESTEN, V. C., *dissentiente*.

Mr. Galt, for the plaintiff, argued as was done in the preceding case, that the invariable practice under the 175th order, having been to confirm the master's report absolute in the first instance, the court would be justified in granting the motion, even if it should be deemed necessary to alter the terms of the order, or adopt a different practice in future.

THE CHANCELLOR.—This is a suit for foreclosure: the plaintiff has proceeded under the order of 1845, in regard to such suits; has procured a decree to be drawn up in the absence of the defendant, who neglected to attend in the master's office, though served with a warrant, as we presume; and now the plaintiff asks that the master's report may be confirmed in the first instance. Judgment.

I think that this order cannot be made; the practice said to have sprung up is certainly less objectionable than that contended for in *Buchanan v. Tiffany*, for here the attention of the party would have been twice directed to the progress of the cause, his interests would not be adjudicated upon were we to grant this order without any notice other than that furnished by the subpoena. But we are of opinion that the 175th rule would not warrant us in granting this motion.

Some difficulty arises owing to the endorsement upon the master's warrant, directed by the 172nd order. The framer of these rules contemplated in all probability a further regulation based upon the endorsement in question, which would seem to have been omitted through inadvertence. But we do not feel ourselves at liberty to treat this form of endorsement as equivalent to an order, or to sanction the continuance of a practice said to have sprung up on such supposition.

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Beside, one would hardly be warranted in concluding from the form of this endorsement, that the framer of these orders intended that the master's report should be confirmed in the first instance, as is now asked. As was remarked in *Buchanan v. Tiffany*, an endorsement somewhat similar in principle is directed by the English orders of 1845, and yet the plaintiff there is not permitted to take a decree without further notice to the defendant, as the endorsement would seem to contemplate, but, on the contrary, those orders provide very carefully for further notice.

Judgment.

The 175th order then, upon which the question arises, declares "that the report shall stand confirmed in the same manner as is now provided for, or hereafter to be provided for by any general order respecting the confirmation of reports." Now if the expression "*as is now provided for*" is to be considered as qualified by the expression "general order," used in the subsequent part of the sentence, then at the time this rule was adopted, there existed no general order warranting the mode of confirming the master's report, which we are now called upon to sanction. But if, on the other hand, the expression "*as is now provided for*" is not to be so qualified, but meant to leave the mode of confirming the report to be settled by English practice, I am opinion that nothing is to be found in English practice warranting the application. Parties entitled to attend the taking of the accounts in the master's office, and consequently entitled to notice, must in all reason be allowed to argue against the propriety of confirming the master's report, which can only be done by service upon him of the order *nisi*. Some allusion was made to the 75th order, as warranting the practice said to have been pursued under the 175th order. I cannot acquiesce in the soundness of the argument. The 75th order makes no provision in terms as to the mode of confirming reports, and the court determined in *Buchanan v. Tiffany*, that the practice introduced in reference to such cases cannot be sustained.

I am of opinion that the framer of the 175th order had reference to the 162nd order passed at the same time, which does introduce a general provision for the confirmation of

reports, and employs similar expressions to those found in the mortgage orders; and I think that the plaintiff is bound to adopt the course there pointed out.

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As I before remarked, in *Buchanan v. Tiffany*, we decide nothing as to cases already perfected by decree. Causes so circumstanced admit of peculiar consideration arising from the practice pursued, and the laches of the defendants, and must be decided as they arise. But in this case, where we are asked to confirm the master's report, I do not feel at liberty to sanction a practice by which the defendant's rights are materially affected, contrary to what I consider the true construction of the rules of the court.

JAMESON, V. C., concurred in the judgment delivered by the Chancellor.

ESTEN, V. C.—In *Walsh v. Bourke*, the proceeding is on the 175th order: this order evidently means that the order for the confirmation of the report shall be served, or rather it does not mean it, but says, without meaning it, service could not have been in the contemplation of the order, because it is utterly inconsistent with the endorsement on the subpœna, which points to confirmation of the report at the expiration of ten days after filing, while the language of the order makes the ten days commence from service. This language, however, is too plain to admit of any but one construction. With respect to this order, also, a practice has grown up and continued for four years, which is at variance with the terms, but probably accords with the intention of the order; and I think the most advisable course is to abide by the practice, and forthwith to vary the order, either by altering the endorsement on the subpœna, or varying the body of the order. I think, therefore, that the order should go in this case as well as in the others.

Judgment.

Per Cur.—Motion to confirm report refused.

ESTEN, V. C., *dissentiente*.

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CHISHOLM V. SHELDON.

Nov. 23, 27,
30, 1849, and
Jan. 4, 1850.

Equity of redemption in term for years—Sale of reversion—Pleading—Parties—Practice—Costs.

A term of one thousand years was created by way of mortgage, and subsequently the interest of the reversioner was sold under an execution against his lands, upon a bill filed by the mortgagor to redeem. *Held*, that the sale by the sheriff did not carry the equity of redemption, and that the mortgagor was entitled to redeem.

Where it comes out in the course of a cause, that the ancestor of one of the parties to the suit, who claims as heir-at-law, has in fact made a will, it is incumbent on the court to direct an enquiry on that point, although unnoticed in the pleadings.

Where, on the hearing of the cause, it appeared from the plaintiff's evidence that certain persons named in the will of the ancestor of the plaintiff were necessary parties, and had not been brought before the court, leave was given to the plaintiff to amend by adding those parties, notwithstanding the fact, that the effect of permitting such amendment would be to enable the plaintiff to vary, to some extent, the case made and the relief prayed, though not to vary the case or to pray any different relief as against the present defendants; and as the defect of parties did not appear by the bill, *held*, that leave could only be granted on payment of the costs of the day.

This was a bill for the redemption of a term of one thousand years, created in 1822 by the owner in fee.

Statement. In 1827, three years after default, *Sheldon*, the mortgagee got possession and made improvements. The mortgagor's interest became vested by assignment in *William Chisholm*, who afterwards died, leaving the plaintiffs his executors, and one of them his heir-at-law. In 1844, *William Chisholm's* interest was put up to sale, under an execution against his lands, and was bought by the defendant *Tiffany*, to whom the sheriff made a deed of the property on the 14th of January, 1845.

The facts of the case are fully stated in the judgment of the court.

The case now came on for hearing; Mr. *Brough* and Mr. *Mowat* for the plaintiffs, Mr. *Adam Wilson*, and Mr. *Vankoughnet* for the defendant *Tiffany*, Mr. *Turner* for the defendants *Sheldon* and *Smith*.

The point mainly relied upon by the counsel for the plaintiffs was, that the sale set forth in the pleadings was in fact an attempt to sell under execution an equity of redemption, which could not be sold, as had been decided by the Court of Appeal in the case of *Simpson v. Smyth*. (a) The reversion, however, and the equity of

(a) 2 U. C. Jurist, 129.

redemption, are separable; and if the sheriff's deed of 1850. 1845 had any operation, it severed those interests: it gave *Tiffany* the reversion, and left with the mortgagor's representatives the equity of redemption in the term. The rule is, that "once a mortgage, always a mortgage;" but here, if the transactions set forth in the pleadings and proved by the evidence, were upheld, the court would be permitting that to be done in a roundabout manner, which it would not permit to be done directly; for the defendant *Tiffany* evidently purchased the mortgagor's reversion for the benefit of the other defendants, who stood in the relation of mortgagees to the plaintiffs.—*Powell on Mortgages. (a)*

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The fact that the reversion was saleable, would not enable the sheriff, under the execution against the lands of Chisholm, to dispose of the equity of redemption, which was the only thing that was at all valuable. The dry reversion, after the term of one thousand years, would have brought nothing, had it not been that the party thought he was buying the equitable estate with it. If the reversion and the equity of redemption are inseparable, then nothing passed under the sheriff's deed of the 14th of January, 1845; for the same policy which makes an equity of redemption unsaleable if alone, would make it unsaleable as connected with such a reversion.—*Scott v. Scholey, (b) Lord Cranstown v. Johnson. (c)*

Statement

Tiffany, it is shewn, attended at the sale by the sheriff in 1844, and asserted that he was the owner. The title, then, was a disputed one, and *Tiffany* is estopped from saying that it was not disputed. If disputed, the land could not be sold under a *fi. fa.*—*Doe Ausman v. Minthorne. (d)*

Assuming, then, that the equity of redemption is in the representatives of the mortgagor, is this a case for granting or refusing redemption under the 11th section of the Chancery Act?

With regard to the improvements made on the premises by the defendants, they can easily be compensated for: £300 are stated to be the value of them, in the schedule to

(a) 1 vol. 260, note.

(c) 3 Ves. 131, 5 Ves. 278.

(b) 8 East. 467.

(d) 3 U. C. Q. B. R. 423.

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the answer; and the same answer alleges that the rent was £80; and none of the circumstances relied upon by the court, in *Simpson v. Smyth*, as grounds for refusing to allow a mortgagor to redeem, are to be found in this case.

For the defendants, it was contended, that the present plaintiffs could not be looked upon as the representatives of a mortgagor who had mortgaged his estate. *William Chisholm's* purchase was a merely speculative affair, and is clearly shewn by the fact of his having purchased from *David Stewart* for £75, and immediately afterwards offering to sell for £1350.—*Prosser v. Edmonds*. (a)

The main question to be decided is, whether or not, the plaintiffs are entitled to redeem? To be entitled to do so, they must shew that they have some legal interest in the land.—*Hard. 467-9; Burgess v. Wheate*, (b) *Cole v. Warden*. (c)

1 *Powel*, 375 (4 ed.), shews, that the equity of redemption is inherent in the land.

Statement.

It was also contended, that the transfer to *Smith*, one of the defendants, by *Sheldon*, was valid as a marriage portion of *Sheldon's* daughter. There was not any court at that time in existence in which he could perfect his title, and *Sheldon* naturally concluded that he was the absolute owner of the term. This case, therefore, comes under the same rule as *Simpson v. Smyth*, and the court will not, under the circumstances here appearing, decree a redemption,

The bill claims redemption in favour of the heir at law, notwithstanding the sale of the reversion, and which, it is clear, passed by the sheriff's deed. The bill goes directly against the sale by the sheriff, asserting that nothing passed under the deed from him. It does not allege any fraud, however, in procuring the deed to be made.

The equity of redemption, it was contended, passed under this deed, the reversion carrying with it the right to redeem. *Chisholm* might have separated the equity of redemption from the reversion, but he had done nothing to effect that object. If he had sold, his assignee could have redeemed without him; and there is no authority to say that the sale

(a) 1 Y. & C. 481.

(c) 1 Vern. 410.

(b) 1 W. Black 145.

of all the right and interest of *Chisholm* under an execution, would not invest in the assignee of the sheriff the same rights and privileges as would be held by the assignee of the debtor himself.

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The redemption operates to re-invest the estate in the mortgagor; here, however, if the plaintiffs are allowed to redeem, it would require to be an assignment, not simply a release. In 1 *Powell on Mortgages*, 251, it is said, "A party may sell the reversion without the equity of redemption; but the reversion being gone from him, he cannot carve out any estate."

Upon the production, by the plaintiffs, of the probate of their testator's will, it was found to contain a devise to persons not before the court, of an interest in the property in question. The defendants' counsel then objected, that these persons should have been parties to the suit; and the plaintiffs' counsel contended, *contra*, that it was not alleged in the pleadings, by any party, that the will was so executed as to pass real estate; that the court would, as against the defendants, assume it was not so executed; because they might have seen the will at the probate office, and should have taken the objection for want of parties by their answers. The absent parties, though interested, would not, in consequence of the plaintiffs' success, be in a worse situation than now.

Statement.

On the plaintiffs' counsel asking the cause to stand over, with leave to amend in case the court should be of opinion that the record was at present defective, Mr. *Turner* objected to their being now permitted to add parties. The bill, he contended, ought to be dismissed on the authority of *Palmer v. Earl of Carlisle*. (a) If, however, the court should be of a different opinion, then this was clearly one of those cases in which the plaintiff must pay the costs of the day, the defect not appearing by the bill, and no opportunity having been afforded the defendants of taking the objection at an earlier stage of the cause. *Furze v. Sharwood* (b) was also referred to by him.

4th January.—The judgment of the court was delivered by

(a) 1 Sim. & S. 423.

(b) 5 M. & Cr. 96.

1850. THE CHANCELLOR.—It appears that one *George Stewart*

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being seised in fee simple of the premises in question, in this cause, demised them to the defendant *Sheldon* for 1000 years, by indenture executed in March, 1822. The object of this conveyance was to secure to *Sheldon* a debt of £625, on or before the 3rd of March, 1824, and on payment of that sum in the manner stipulated, it was provided by the indenture that the term should cease. By virtue of various conveyances in the pleadings particularly stated, all the interest of *George Stewart*, being the reversion in fee expectant upon the term, and the equity of redemption, became vested in *William Chisholm*, the testator in the pleadings named. We do not find any thing in those conveyances material to be further noticed, except that the first between the mortgagor and one *William Waterbury*, was executed shortly after the mortgage had fallen due—on the 30th of March, 1824. The conveyance from *William Waterbury* to *David Stewart* is dated on the 2nd of May, 1837, and that from *Stewart* to *Wm. Chisholm*, bears date on the 16th of the same month in the same year. *Wm. Chisholm* departed this life in May, 1842, having first, as the bill states it, “duly made and published his last will and testament, in writing, bearing date the 27th day of March, 1841, and appointed his eldest son and heir-at-law, *George K. Chisholm*, (one of the plaintiffs,) and *J. A. Chisholm*, and *R. K. Chisholm*, (two other of the plaintiffs, and also sons of the testator) his executors, and the bill goes on to state that they soon after his death duly proved the said will in the Court of Probate, and took upon themselves the burthen of its execution.”

Judgment.

By indenture between defendant *Sheldon* of the one part, and defendant *Smith* of the other part, bearing date the 5th of June, 1834, *Sheldon* professes to convey the premises in question to *Smith*, in fee simple, in consideration of £1500.

Subsequently to the last mentioned conveyance, judgment having been obtained against *Sheldon*, by one *Reale*, a writ of *fiery facias* was sued out thereon, and placed in the hands of the sheriff of the Gore District. The bill states this writ to have been against the lands of *Sheldon*; but

from the answer and evidence, it is clear that it was a writ against goods; and under it the sheriff offered for sale *Sheldon's* interest in the residue of the term then unexpired.— At that sale the defendant *Tiffany* was declared the highest bidder for £70, and thereupon, by deed poll dated 11th day of November, 1840, the sheriff professed to convey to *Tiffany* all *Sheldon's* interest in the premises.

The bill alleges, that by some deed of a subsequent date, *Smith* conveyed all his interest to *Tiffany*.

It charges that the conveyance from *Sheldon* to *Smith* was voluntary and moreover fraudulent, as designed to defraud *Sheldon's* creditors. It charges the dealings of *Tiffany* to have been collusive, and designed to complicate the title and embarrass the plaintiffs in any effort they might make to redeem the estate. The prayer is, “that upon payment by the *plaintiffs* of what (if any thing) is found due to the defendants, or such of them as might be entitled to receive the same in respect of principal money or interest, the defendant might be directed to deliver up possession of the mortgaged premises to plaintiff *G. K. Chisholm*, or whom *he* should appoint, free from all incumbrances made by them, or any person claiming under them, and might deliver to plaintiffs all deeds and writings in their, or any, or either of their custody, or power relating to the mortgaged premises.”

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Judgment.

The defendants have answered separately; their statements, however, do not in any material point differ, neither do they to any considerable extent displace the facts as detailed in the bill. They shew that *Sheldon* entered into possession of the mortgaged premises in 1827. They admit the deed of 1834 to have been voluntary, but insist upon it as *bona fide*, having been executed as a provision for *Sheldon's* daughter, who had been married to *Smith* shortly before the date of the deed in question.

Tiffany relies upon the deed executed by the sheriff of the Gore District in November, 1840, and states that *Smith* being satisfied of the validity of his *Tiffany's* title, proposed by way of compromise to convey to *Tiffany* all his interest, upon *Tiffany's* agreeing to re-convey the whole to *Smith*

1850. on payment of £400. And that in compliance with that proposition of compromise, by indenture between *Smyth* and *Tiffany*, bearing date the 14th of May, 1842, *Smyth* conveyed to *Tiffany* all his interest in the premises, and *Tiffany* by bond of the same date obliged himself to reconvey to *Smyth*, on payment of £400 at the times therein specified. The other defendants admit these transactions, and insist upon their rights thereunder.

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Tiffany further discloses, that the sheriff of the Gore District, by virtue of several writs of *feri facias* against the land of *Wm. Chisholm*, exposed to sale the reversion in fee of the premises in question in the cause, and that he *Tiffany* was declared the highest bidder at £40, and that thereupon the sheriff by deed poll, dated 14th of January, 1845, conveyed to defendant *Tiffany* all *Chisholm's* interest in the premises. This sale was subsequent to the filing of the bill, and has not been brought before the court except by the answer of *Tiffany*.

Judgment.

Upon the argument of this case, it was admitted, and as we think properly, that the deed of November, 1840, was inoperative; but it was contended that no decree ought to be made, for the following reasons: first, because under the circumstances of this case this court ought, in the exercise of the power vested in it under the 11th section of the 2nd chapter of the 7th William IV., to refuse redemption. Secondly, because *Tiffany* having purchased the reversion in fee expectant upon the mortgage term, under the deed of 1845, the equity of redemption passed with it, and that therefore the plaintiffs had no title to file this bill. And upon the production of *Wm. Chisholm's* will, in the progress of the cause, it was objected that the suit was defective for want of parties, the right to redeem being in the devisees of *Wm. Chisholm*, who were not all before the court.

As to the first objection, we have no hesitation in deciding that to deprive the plaintiffs of their right to redeem in this case, would, in our judgment, be an unwise exercise of the power vested in this court by the legislature. We fully concur in the judgment of the Court of Appeal in

Simpson v. Smyth, that the power has been confided to us of permitting redemption, notwithstanding the lapse of more than twenty years, and of refusing it although twenty years may not have elapsed. The entire equitable jurisdiction in relation to mortgages, was designed to give to those contracts that character which the original intention of those contracting, or the nature of the transaction, might indicate as the true object of the parties, and to deduce from those mortgage contracts so understood, such consequences as reason should point out as equitable. The mortgagor is treated not as the vendor of an estate, but as the borrower of money, and he is therefore permitted at any time within twenty years to redeem his property, which, though legally vested in the mortgagee, according to the letter of the contract, is still regarded for all practical purposes, other than securing payment of the debt, as the estate of the mortgagor. But had courts of equity gone no further, injustice would have been done to the mortgagee, and the intent of the parties on entering into the contract defeated. For the mortgagee, although not a purchaser, but merely a lender, is still a lender upon pledge of land, with stipulation for payment at a fixed day. To have debarred him of the power to realise his debt from such pledge for a period of twenty years, would have been to defeat the intent of the parties instead of enforcing it. The mortgagee is therefore permitted at any moment to make his estate absolute in equity as well as at law, by bill of foreclosure. Thus courts of equity laboured to render mortgage transactions effectual for the accomplishment of the true intention of the parties, by investing the mortgagor during a limited period with an ideal equitable estate, after the legal estate had become vested in the mortgagee, and by treating the mortgagee with his legal title during the same period as having a mere pledge. This ideal separation of the legal from the equitable title is continued for the period limited by the practice of the court, unless either party will in the interim signify an intention to vary it by filing his bill in this court. But upon such application, this court may at any moment within the time limited, annex the legal estate to the equitable in favour

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Judgment.

1850. of the mortgagor, on payment of the debt; or on the other hand, may unite the equitable to the legal title in favour of the mortgagee, on failure of payment at such time as the court may deem reasonable.

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Sheldon.

Judgment.

Now, in giving vitality to these equitable doctrines, by the establishment of a Court of Chancery, it is obvious that the relief extended to the mortgagor would have been palpably defective, had no power existed of permitting redemption after twenty years. The existence of an abstract right to redeem for a period of twenty years, during which no court had existed, to which the mortgagor could have applied for relief, will not have been thought a very satisfactory reason for holding a mortgagor to the limitation fixed by English practice. On the other hand, the injustice would be hardly less glaring, of treating the estate of the mortgagee as in all cases redeemable within the English limitation, although the mortgagee might have afforded every opportunity to redeem which a court of equity would have permitted, had one existed, and although, on the faith of having done all that good conscience required, he might have so dealt with the estate as to render redemption upon just terms impossible. Where matters have remained in *statu quo*, possession only having been changed, why should redemption be refused? The *mortgagor* had no tribunal to which he could have sooner applied. Where the *mortgagee* has advanced the value of the estate, has given the mortgagor notice, has allowed every opportunity to redeem which a court of equity would have permitted, and failing to obtain his debt, has treated the pledge as his absolute property, devoting his time and energy to its improvement, in such a way that the court sees that he could not be disturbed without occasioning injustice, why should redemption be permitted, only because the period limited in England has not elapsed? The mortgagee had no tribunal to which he could have applied.

To meet the injustice possible in both cases, from an adherence to the strict English rule, the legislature wisely, we think, committed to this court a discretionary power in this matter. But that power is not to be used arbitrarily.

If the mortgagor is to be deprived of his right to redeem, or if that right is to be extended, those conclusions must be arrived at upon principles of justice, satisfactory to our reason, such as existed in the case of *Simpson v. Smyth*. But without entering minutely into the evidence of this case, we confess ourselves unable to discover any principle upon which we could properly refuse the present plaintiff the right to redeem.

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Upon what reasonable ground could this court have dismissed this bill, had it been filed in 1837? I see nothing in the dealings prior to that period which could have warranted this court in making such an order. But if the right to redeem would have been then manifest, how can the subsequent occurrences justify us in now refusing it? Since that period the defendant has had the means of acquiring the equitable title. If instead of using those means, he has thought proper to deal with the estate as his own, we are at a loss to discover in such a course, any ground for our now dismissing the plaintiff's bill. But apart from that view, the course of dealing with this estate has not been of a character to impress us with a feeling that a decree for redemption would be attended with any injustice towards the present defendants. The defendants have, in our opinion, entirely failed to bring their case within the 11th section of 7th Vic.

Judgment

But it has been argued in the next place, that *Tiffany* having purchased the reversion in fee expectant upon the mortgage term, the equity of redemption has passed to him with the reversion, being necessarily inherent in and inseparable therefrom. In discussing this branch of the case, it was argued, that this term having been created for the mere purpose of securing the mortgage debt, was inseparable from the reversion, and that no authority could be found to justify Mr. *Powell's* statement, in his work on mortgages, that it would have been competent to the mortgagor himself to have given it a perfect separate existence. Much research was displayed in ascertaining the exact nature of an equity of redemption; and it was urged that, to hold it to pass with the reversion, not only was not inconsistent with

1850. any rule of law, but that the opposite determination would be inconsistent with settled principles, interposing the equity of redemption between the reversion and the term, in a manner warranted neither by reason nor authority. And we were pressed by the determinations in what were considered analogous cases, under which tenants by eligit, judgment creditors, &c., were permitted to redeem.

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Judgment.

We have not been able to persuade ourselves that there is any force in the arguments on this branch of the case. It surely cannot require authority to establish the proposition, that it is competent to a tenant in fee simple to create a term for any number of years, either absolute or upon condition to secure a mortgage debt, as in this case. And it cannot be doubted, that should the tenant in fee simple create a conditional term, as here, it would be competent to him afterwards, either to release his equity of redemption to the mortgagee, or to assign it to a stranger,—in either case, severing the reversion from the term, and leaving in himself nothing but the reversion. Apart from the reason of the thing, growing out of the uncontrolled power of disposition allowed by our law to the owner of the inheritance, the whole history of the doctrine of this court, as to terms, whether attendant upon the inheritance or in gross, and the manner in which it has allowed them to be used for the benefit either of the owner of the inheritance or of incumbrancers, affords the clearest refutation of this part of the argument. (a)

Indeed, so much is this the case, that the doubt formerly would seem to have been, not whether this severance might not take place, but whether it did not necessarily follow in cases of descent.

In *Bamfield v. Wyndham*, (b) plaintiff's father seised in fee demised to defendant's father for 1000 years, the term to sink and be extinguished if plaintiff should pay defendant £80 per annum for forty-two years. Plaintiff filed his bill against defendant, to compel him to surrender the residue of the term. Defendant admitted that the forty-two years had expired, but demurred because the executor or

(a) Willoughby v. Willoughby, 1 S. R. 763. (b) Rep. Tem. Finch, 101.

administrator of plaintiff's father had not been made a party. The demurrer was overruled without costs. And in the subsequent case, *Bradshaw v. Outram*, (a) before Sir *Wm. Grant*, where the tenant in fee simple had created a term of 1000 years by way of mortgage, and died, a bill of foreclosure had been filed against the infant heir-at-law and the executrix to foreclose, Sir *John Leach* contended upon the argument that the bill should be dismissed against the executrix. Mr. *Hart* and Mr. *Spranger* argued for plaintiff, and contended that the executrix should be a party, as she was the proper party to redeem, and if not made a party, might compel redemption after a decree in a suit against the heir. Sir *W. Grant* applied to Mr. *Richards* as to the practice. The cause stood over for precedents, and the bill was eventually dismissed as against the executrix without costs. These cases prove, indeed, that the personal representative of the mortgagor is not a necessary party to a suit like the present. But they also shew that the doubt has not been as to the possibility of separating the reversion from the equity of redemption of the term, but rather whether a separation did not naturally take place upon the death of the mortgagor, the reversion vesting in the heir-at-law, and the equity to redeem passing to the personal representative.

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Judgment.

The argument, which was much urged by the defendants, and which represents the severance of the reversion from the right to redeem the term, as resulting in the interposition of this equity between the reversion and the term in a way unknown to the law, seems to us as devoid of force as the one we have just been considering. The mortgagor might himself have assigned the right to redeem this term. Had he done so, the reversion, the term, and the right to redeem would have subsisted separately, without the violation of any principle of law or reason that we are acquainted with. We are of opinion, that the severance of the reversion from the right to redeem in this case, would be no more repugnant to reason than in the one

1850. we have just considered. The error seems to be with those who contend for the absolute and entire amalgamation of the equity with the estate, rather than with those who argue for their possible separation. And so in the passage in Mr. *Powell's* book on mortgages to which we were referred,—“And in this place we may observe a distinction between the reversion expectant on a mortgage for years, and the equity of redemption which resides in the mortgagor as a separate right or title from that of the right to the reversion. (a) The reversion, it is true, forms no part of the mortgage transaction; and in ascertaining the estate and interest of the mortgagor, it would not be correct to say that he has also a reversion, for he has not the reversion in virtue of his character of mortgagor, but as tenant of the fee simple.” (b)

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The reversion in fee then and the right to redeem having descended to the heir of *Wm. Chisholm*, (as we assume for the moment,) the same power of severing these interests which his ancestor enjoyed, must, we think, belong to him. And a severance which might be effected by *Wm. Chisholm's* heir at his mere will, may, as we think, be effected by *Wm. Chisholm's* creditors, for the purpose of satisfying their debts from his estate. It is quite clear that the equity of redemption could not be sold under a writ of *fieri facias*. *Simpson v. Smyth*, and the cases there cited have, we think, settled this point. But it is equally clear that the reversion in fee may be sold under such a writ. (c) It is legal assets. A writ of *fieri facias* affecting the lands of *Wm. Chisholm*, having been placed in the hands of the proper sheriff, in this case, and a sale having been had thereunder, the sheriff's deed will, we think, (assuming the sale to be valid,) pass all that the sheriff had any power to sell—the reversion in fee—leaving still in the heir the right to redeem the term, which cannot be affected except through the medium of a suit in this court. The sale of the reversion cannot destroy the right to redeem. It cannot

(a) 1 Powell, 250 (b) n A.

(b) 1 Powell, 260, (a) n.

(c) *Plunkett v. Pearson*, 2 Atk. 294.

carry with it that right: it is not saleable under such process, consequently it still remains with the heir. 1850.

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The cases cited in argument, where judgment creditors, tenants by eligit, &c., have been allowed to redeem such a term appear to us in no way analogous. These parties having acquired a lien upon the estate of the mortgagor, come to the court and ask to be allowed to redeem the term, to remove it out of their way. They are allowed to exercise the right to redeem as the mortgagor himself could, only for the purpose of satisfying their debt. They are after redemption still but mortgagees. Here the purchaser of the reversion claims to redeem the estate for his own benefit, as the owner.

We now come to the last objection, which, though little discussed in argument, no authority having in fact been cited, has caused us much doubt and embarrassment in determining the course which it will be proper to adopt. Had the objection been, indeed, one of form for defect of parties, we would have felt it right to abstain from pronouncing any opinion upon the merits of the case; and no doubt could have existed as to the order to be made, had such a defect become apparent. But it is plain that the application now made to us is very different from the ordinary application to amend by adding parties. It involves principles materially affecting the due administration of justice. And inasmuch as the correct decision has seemed to us to depend upon the judgment we might form upon the merits of the plaintiffs' case, we found it necessary to consider the case generally before approaching this question. Judgment.

It is unquestionable, as has been argued, that the power of directing enquiries, whether for the purpose of elucidation or for the further trial of matters in issue; the power of allowing further interrogatories to be exhibited, or directing an issue to be tried; all these proceedings are permitted, more or less, for the purpose of satisfying the conscience of the judge upon whom is devolved the onerous duty of deciding such issues of fact as may arise in the course of a cause. (a)

(a) Gresley on Evidence, 194, et seq., 489, et seq.

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The propriety of using such means of acquiring additional information, is unquestionably, to a great degree, a matter of discretion; but then it is a discretion to be regulated by such general rules as have been found best calculated to promote the ends of justice, and thus protect the interest of suitors.

Now in this case, (assuming it to be a bill by an heir claiming as heir,) had it come out in the course of the cause that *William Chisholm* had in fact made a will, it no doubt would have been not only competent to the court, but incumbent upon it to have directed an enquiry on that point, although unnoticed in the pleadings. (a) An enquiry under such circumstances would seem in accordance with well established practice, although the extent to which the information obtained by such enquiry is to have effect, and the manner in which it is to be made available, must depend upon the circumstances of each case, and seems open to a good deal of doubt and question. (b)

Judgment.

Neither should we have felt any difficulty in allowing the plaintiffs now to exhibit an interrogatory for the purpose of establishing the will of *William Chisholm*, had they, through the mistake or inadvertence of their solicitor, omitted such proof, although the cases collected by Mr. *Seaton*, in his book on decrees, page 363, are conflicting, and can hardly be said to furnish principles upon which any fixed rule can be founded.

But we have been unable to discover any case affording a precedent for making the order now asked. The frame of this suit is so peculiar, that it is by no means easy to determine whether the plaintiffs claim adverse to the will of *William Chisholm*, or under it. If they claim under the will, then we are of opinion that the statement in the bill sufficiently alleges that *William Chisholm* made a will affecting his real estate. That statement indeed is not in the ordinary form; but the rules of pleading at law are more strict than in this court, and at law this allegation

(a) *Parken v. Whitby*, T. & R. 371; *Phelps v. Prothero*, 12 Jurist, 733; *Smith v. Spencer*, 1 Y. & C. 75; *Connop v. Hayward*, 1 Y. & C. 33.

(b) *The London and Birmingham Railroad Company v. Winter*, C. & P. 57; *Kent v. Burgess*, 11 Sim, 361; *Phelps v. Prothero*, 12 Jurist, 733.

would have been sufficient in a declaration. (a) We further find that the defendants *Sheldon* and *Smith* have admitted the will of *Wm. Chisholm*, and the defendant *Tiffany*, although he has not admitted it, neither has he denied it. To make the case perfect, therefore, as a case claiming under the will, the plaintiffs would require to amend by making the devisees parties, an interrogatory should be exhibited to prove the will as against *Tiffany*, and possibly the prayer would require alteration. (b)

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If, on the other hand, the plaintiffs are here claiming against the will, as would seem to be inferred from that part of the prayer which asks delivery of possession to the heir free from incumbrances, then the cause would still seem defective for want of parties, and the plaintiffs, instead of stating upon the face of the bill "a will in writing duly executed," would, we presume, find it necessary to introduce new statements and supply further proof.

We leave out of view that part of the application which asks an amendment by adding parties. That would seem to be a necessary consequence of the rule which says that a bill shall not be dismissed for want of parties. And the leave to make such an amendment involves the right to introduce into the bill such statements as may seem requisite to connect the new parties with the objects of the bill, and also the right to enter into evidence to establish the case against them. To that extent, therefore, we have felt no difficulty.

Judgment.

But when we are asked to go further and exercise this discretionary power for the purpose of enabling the plaintiffs to vary the case made and the relief prayed, we have hesitated very anxiously, lest, in seeking to do what seems to us just, in this particular case, we should be found to have impaired the usefulness of this court in administering justice, by introducing uncertainty and confusion into its practice. No doubt an order by which a plaintiff should be permitted at the hearing to make a new case and to

(a) 2 Chit. Plead. (6 ed.) page 397; 1 Saund. 276, a (n 2); Daives v. Reeves, Ver. & Scriv. 497; Stephen's Plead. 375; Story 212.

(b) Powell Devises, by Jarman, chap. 34; Doe dem. Playter v. Nicholls, 1 B. & C. 336.

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enter into new evidence, would be open to grave objection, either here or in England. Possibly the difficulties may be regarded as insurmountable in England, having regard to the system of taking evidence used there. We feel the full force of the observations used by Lord *Cottenham* on several late occasions, but after an attentive consideration of the authorities to which we have referred, we are of opinion that it will be our duty in this case, to grant to the plaintiffs the permission they have asked. (a)

Judgment.

Because, first—the application here is not to vary the case as against the present defendants, or indeed to pray any different relief as regards them. The bill is for redemption, and the prayer in accordance therewith. We are of opinion that the case has been established as against the defendants, the only question remaining is as to the parties in whose favour such relief should be decreed, a matter in which these defendants have little, if any, interest. Secondly—had the application to amend been of a more extensive kind, we should have felt great difficulty in enforcing strictly the rule to be deduced from the cases before Lord *Cottenham*. The principal ground upon which the Lord Chancellor reversed the decrees of Vice-Chancellor *Knight Bruce*, was, that to give to the plaintiffs permission to make a new case at the hearing, would be to multiply indefinitely the chances of perjury, and in effect to defeat the whole system by which courts of equity have laboured to render the mode of taking evidence, though confessedly imperfect, yet in some degree effectual for the ascertainment of truth. These reasons have little application here: each side has a right to be present at the examination of every witness: he is permitted to cross-examine; and the opportunity of manufacturing testimony so much apprehended by Lord *Cottenham*, as likely to result from permitting amendments at the hearing, does in fact exist in every case in this country. Lastly, the tendency of modern decision and legislation, as well in England as here, to prevent as far as possible the failure of justice from technical defects and

(a) *Phelps v. Prothero*, 12 Jurist, 733; *Watts v. Hyde*, 2 Phil. 406; *Bellamy v. Sabine*, 2 Phil. 425.

difficulties—the enlarged power of amendment and of postponing trials for the purpose of permitting amendment, conferred by the legislature upon the courts of common law, as well here as in England—the extension of this principle even to criminal cases, lead us to the conclusion that we should not exercise a sound discretion were we to refuse the plaintiffs permission to amend.

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MICHIE V. CHARLES.

Practice—Pleading—Parties—Creditor's bill.

Where it appeared that a person interested was not before the court, the bill stating such person to be out of the jurisdiction, but no proof was adduced of that fact, the court refused, notwithstanding the consent of the defendant's counsel, to proceed with the cause without such evidence being furnished.

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A large body of creditors may be represented by one or more of the number, but in any such proceeding the bill must disclose a sufficient reason for this departure from the rule of practice, requiring all persons interested to be parties to the suit. Where, therefore, a bill by one of several creditors entitled under a deed of trust, was filed, and stated "that the creditors of the said L. entitled to the benefit of the said indenture are too numerous to make it practicable to prosecute this suit if they were all made parties.—*Held*, that such statement was too general to satisfy the court that the rule could not be complied with.

Quære.—Whether necessary to furnish proof of the allegation, that parties are too numerous to be all brought before the court—and whether in a creditor's suit, any decree can be made without previous proof of his debt.

Mr. *Turner*, for plaintiff.

Mr. *Galt*, for defendant.

The facts appear in the judgment of the court, which was delivered by

THE CHANCELLOR.—The bill in this case has been filed by the plaintiff on behalf of himself and all the other creditors of *John Lister*, and prays for the distribution of *Lister's* estate, in accordance with a deed executed by him in the year 1845. By that instrument the debtor conveys all his estate, real and personal, to the defendant in this suit, in trust to pay his creditors *pari passu*, and the residue to the debtor.

Judgment.

The bill states *Lister* to be out of the jurisdiction, and the learned counsel for the defendant consents to such decree as the court may think right, but no evidence has been furnished in support of the allegation that *Lister* is out of the jurisdiction. We are of opinion that the cause

1850. cannot proceed without evidence of that fact. *Lister*, no doubt, would be a necessary party under ordinary circumstances; he is interested in the account, and entitled to the surplus. If he be out of the jurisdiction, the court may, no doubt, proceed in his absence; but that fact must be established by evidence. *Lister's* rights cannot be affected in his absence by the consent of the defendant here. (a)

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v.
Charles.

Judgment.

This objection must preclude us from proceeding further with the case at present. It is proper, however, to remark, that some difficulty occurred to us upon the construction of the trust deed. The bill is filed on behalf of *all* the creditors of *Lister*; but some portions of the trust deed would seem to limit its operations to the *scheduled creditors* only. We do not express any decided opinion upon the point, but have felt it right to call the attention of counsel to the question. We are further of opinion that the allegation introduced into the bill, to warrant the institution of the suit by *Michie*, on behalf of all the other creditors, is not sufficient for that purpose. We have no doubt that a large body of creditors may be represented by one or more of the number in a proper case, and we see no intrinsic difficulty here. (b) But we think that in all such cases, the record must disclose a sufficient reason for the departure from the settled rules of pleading. In *Holland v. Baker* (c) it appeared from the trust deed produced at the hearing, that fifty-seven creditors had executed; yet Sir *James Wigram* ordered the cause to stand over, with liberty to amend. And when the cause was subsequently brought on, the allegation introduced into the record, although much more full than in the present instance, was pronounced by him to be far too meagre to satisfy the court of the difficulty of observing the general rule, or the necessity of its relaxation, and the cause was again ordered to stand over.

The plaintiff will consider the necessity of furnishing proof of that allegation, and also, whether any decree can properly be made without previous proof of his debt.

(a) *Eggington v. Burton*, 1 Hare 489 (n); *Hughes v. Eades*, 1 Hare, 486.

(b) *Weld v. Bonham*, 2 S. & S. 91; *Handford v. Storie*, 2 S. & S. 196.

(c) 3 Hare, 68.

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MCNAB V. GWYNNE.

Practice—Dismissing bill for want of prosecution—Amending bill—Diligence.

A motion to amend is no answer to a motion to dismiss for want of prosecution. A plaintiff moving to amend after the time limited by the ninth order (of this court) must shew that the order could not be complied with, though due diligence had been used.

Mr. *Gwynne* moved to dismiss the plaintiff's bill for want of prosecution.

Mr. *R. Cooper*, contra, read an affidavit stating that the plaintiff was about to amend, and asked the court to waive the necessity of the plaintiff undertaking to speed.

Mr. *Gwynne*, in reply. The only answer that can be given to this motion is, for the plaintiff to undertake to speed, and referred to *Edge v. Duke*, (a) *Jones v. Morgan*. (b)

Mr. *R. Cooper* then moved for leave to amend, without prejudice to the common injunction, and read an affidavit on which to ground his motion, stating certain amendments sought to be introduced: he referred to *King v. Turner*. (c)

Mr. *Gwynne*, contra. Leave to amend in this case ought not to be granted; the plaintiff by applying to amend admits that his bill is not sufficient to sustain the injunction without introducing statements from the answer.

Argument.

A verdict has been rendered at law for the defendant (in this suit) and the court will not enjoin him, except on the terms of paying the amount of the verdict into court.

He referred to *Eden* on Injunctions, 148-9, and the judgment of the Court of Appeal in *Merritt v. Tobin*, reversing the decision in the court below, as reported in 2 U. C. Jurist, 257.

The judgment of the court, in both motions, was delivered by—

THE CHANCELLOR.—The bill in this case was filed to restrain an action at law on covenant. The common injunction issued for want of an answer. A motion was made on the 26th June last, to dissolve that injunction upon the answer which had been filed on the 6th of the same month, and upon that motion the injunction was continued to the

(a) 11 Jurist, 213.

(b) 12 Jurist, 388.

(c) 6 Madd. 255.

1850. hearing. The defendant has now moved to dismiss the bill for want of prosecution, and the plaintiff by cross motion, made on the same day, asks for leave to amend, without prejudice to the injunction already issued.

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We were surprised to hear from the learned counsel who argued these motions, that the practice of the court on the points involved was subject to any doubt. We intimated our opinion upon the argument, that the motion to amend was no answer to the motion to dismiss, and that the plaintiff's motion to amend had not been sustained either as a motion to amend after the time allowed by the practice of the court, or as a motion to amend without prejudice to the common injunction. In deference to the doubt expressed, we postponed our judgment, for the purpose of looking into the authorities, but have not been able to discover any reason to doubt the propriety of the views then expressed.

By the 3rd order, an answer is to be deemed sufficient after fourteen days in a town cause, and after one month in

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By the 9th rule, no order to amend can be made after answer and before replication, unless made within one month after the answer is to be deemed sufficient.

By the 12th order, the defendant is to be at liberty to move to dismiss for want of prosecution, unless the plaintiff shall have proceeded with his cause within twenty-one days after the answer shall have been deemed sufficient.

The construction of these orders does not, we think, admit of doubt. It is true, indeed, that their combined effect will give rise to this anomaly, that in a country cause, a defendant may move to dismiss during the period the plaintiff is permitted to move to amend; but this anomaly existed under the 13th of the English orders of 1828, of which the order of this court, so far as this discussion is concerned, is a copy. But in England, a motion to amend was never regarded as an answer to the defendant's motion to dismiss. On the contrary, the Vice-Chancellor of England, in *Swinfen v. Swinfen*, (a) ordered the bill to be dismissed, upon a motion of which notice had been given on the 17th of February,

although an order to amend had been obtained by the plaintiff on the 19th of the same month, the time within which the plaintiff was entitled to that order as of course not having then expired. His honour continued of the same opinion after the order of 1828 had in some respects been amended. (a) Indeed we find no conflict of authority on the subject.

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An order to amend taken out and served, is an answer to the defendant's motion to dismiss, although the plaintiff must still pay the costs; but a mere motion to amend cannot avail, consequently the defendant's motion to dismiss must be made absolute, unless the plaintiff will enter into the undertaking to speed.

As to the plaintiff's application to amend without prejudice to his injunction, we have not been able to discover any case warranting the doubts as to the practice expressed by the learned counsel. It seems well settled that the motion to amend without prejudice to the common injunction, *after answer*, has always been regarded as a special motion, whatever doubts may in later times have arisen as to the effect of such an order before answer. (b) But we do not discuss that part of the motion, because we are of opinion that the plaintiff has not established a case for allowing an amendment, irrespective of the question growing out of the injunction. Judgment.

The language of the 9th order is express that *no amendment* shall be allowed between answer and replication, unless obtained within a month after the answer shall have been deemed sufficient; here the month has elapsed. The object of the motion is, to dispense with this general rule, and the plaintiff, obviously, must shew that the rule could not with due diligence have been complied with. The doctrine is thus stated by Mr. *Daniel*: (c) "Before the orders of 1845, when the period of six weeks from the sufficiency of the last answer had expired, and before replication, the court itself under its power of dispensing with the general orders, sometimes received applications for leave to amend. It

(a) *Peacock v. Sievier*, 5 Sim. 553; and see *Gully v. VanBodicoate*, 5 Sim. 668. (b) *Ferrand v. Hamer*, 4 M. & C. 143. (c) Vol. 1, p. 477, (2 ed.)

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seems that such an application was not granted without an affidavit in addition to those mentioned in the last page, (being the affidavits required by the 9th order,) shewing that the matter of the proposed amendment was material, and could not with reasonable diligence have been sooner introduced into the bill."

Here all the amendments sought to be introduced at this late period have been suggested by the answer, and that, too, several months after a discussion upon that answer as to the propriety of dissolving or continuing the common injunction. How is it possible to say that due diligence has been used?

Judgment.

We do not at present discuss the propriety of extending a common injunction after judgment at law, without ordering the money into court; such an order would seem contrary to the well settled practice of this court. The language of Lord *Cottenham* in *Barnard v. Wallis* (a) conveys a very grave caution:—"At what interval of time that hearing will take place, if at all, and from whom the plaintiff at law will then have to recover any thing he may be entitled to, are matters extremely uncertain, and therefore very dangerous to speculate upon."

Per Cur.—Motion for leave to amend refused, with costs.

In order to avoid the dismissal of the bill, plaintiff undertook to speed.

Reference was also made by the court to 16 Law J. ch. 69; 2 Hare 637; 1 Dl. C. P. 541.

PASSMORE V. NICOLLS.

Practice—Substitutional service.

Jan. 22.

Where a plaintiff desires to effect service of the subpoena, by serving the agent of an absent defendant, he must shew that the party to be served is the agent of the defendant, in relation to the subject matter of the suit, to such an extent as to satisfy the court that the acceptance of a subpoena by such agent will fall within the authority conferred upon him by his principal: where, therefore, a motion for such an order was made, grounded on an affidavit which stated that the agent at present conducted the defendant's business of land agent, and had "acted for the defendant in reference to the mortgage which was the subject matter of the suit"—the application was refused.

(a) C. & Ph. 88.

Mr. *Strong* moved for an order, that service of a copy of the subpoena in this cause upon *William Kissock*, who, as was stated in the affidavit filed, had acted as the agent of *Nicholls* in reference to the mortgage the subject matter of the present suit; and *Hobhouse v. Courtney* was referred to as an authority on this point.

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THE CHANCELLOR.—The plaintiff moves that service of the subpoena to appear and answer, upon one *Kissock*, be deemed good service. The motion is made upon an affidavit, which states that the defendant is at present absent from this province in England; that *Kissock* now conducts the defendant's business of land agent, "*and that he has acted for him in reference to the mortgage which is the subject matter of the present suit.*"—*Hobhouse v. Courtney* (a) was cited.

We are not insensible to the importance of disencumbering suits in this court of merely technical difficulties, and of subjecting the plaintiff's proceedings to as little delay as is consistent with the due administration of justice. But we think it impossible, either upon reason or authority, to grant this application. Such a practice, besides being open to the objection so forcibly stated both by Lord *Lyndhurst* and Lord *Cottenham*, seems to us calculated to impair the utility of the rules already introduced for the purpose of expediting equity proceedings, and to militate against the introduction of those further regulations which we have been empowered by the legislature to frame. Whilst abolishing technical objections and circuitous modes of procedure, and dispensing with useless notices, we must take care to preserve established forms found conducive to the interests of suitors; and we must see that suits are not carried on behind the backs of those interested, without that actual notice which is necessary to the attainment of substantial justice.

Judgment.

All the cases agree, that to warrant an order of this sort, an agency must be established. Without such proof, the court would in effect determine the rights of a defendant

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in his absence. The question has been, as to the nature and extent of the agency which would warrant the order now asked. Service upon a mere general agent could not, we think, be ordered, consistently with reason or authority. But whether the party upon whom service is to be made must have been appointed as agent *for the purpose of the suit*, or whether an agency in relation to the *subject matter* of the suit may not suffice, is open to more doubt. The language of the Vice-Chancellor in the case cited, is not very distinct; but when that decision came before Lord *Lyndhurst*, in *Murray v. Vipart*, (a) his lordship seems to have construed Sir *Lancelot Shadwell's* language as warranting substitutional service only where an agency *for the purpose of the suit* had been established. Sir *James Wigram* had previously explained the necessity of proceeding cautiously in applications of this sort, and expressed his determination not to extend *Hobhouse v. Courtney*; (b) and Vice-Chancellor *Knight Bruce* refused a motion of this kind, although the party to be served had acted as the general agent of the defendant, and as his solicitor in relation to the particular subject matter, in the course of another cause which had been instituted in relation thereto. (c) It is true that Lord *Cottenham*, in a cause decided during the past year, (d) would seem to have regarded the application with more favour than some of the learned judges we have mentioned, but his lordship relies upon *Murray v. Vipart*, and approves the caution of Lord *Lyndhurst* in that case.

On the whole, we think it expedient to adopt the rule that the party to be served must be shewn to be the agent of the defendant in relation to the subject matter of the suit, to such an extent as to satisfy the court that the acceptance of a subpoena by such agent will fall within the authority conferred upon him by his principal.

In this case there is clearly no evidence of agency within the authorities. The management of the defendant's business as land agent is clearly insufficient. And although

(a) 1 Phil. 521.

(b) *Webb v. Salmon*, 3 Hare, 251.

(c) *Hurst v. Hurst*, 12 Jur. 152.

(d) *Norton v. Hepworth*, 1 McN. 54.

it is sworn that "*he acted in relation*" to the mortgage which is the subject of the suit, such acts may have been unauthorised; at furthest, can only be said to have been in pursuance of a general agency, not falling within the rule we have laid down.

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 Passmore
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 Nicholls

FENNY V. PRIESTMAN.

Pleading—Parties—Heir-at-law.

In a creditor's bill against the devisees of a debtor, it is not indispensable that the heir-at-law should be a party.

Mr. Mowat for plaintiff.

Mr. Muttiebury and Mr. Crickmore for the other parties.

The nature of the case before the court is fully stated in the judgment of

THE CHANCELLOR.—A creditor's bill had been filed in this case, against the executrix and sole devisee of *Matthew Priestman*, for the administration of his estate, real and personal, and the usual decree made. Upon the cause coming before us upon further directions, a doubt arose whether the heir-at-law of the testator should not have been a party. Judgment.

The decisions are somewhat conflicting. In *Weeks v. Evans* (a) the Vice-Chancellor of England held that the heir-at-law was not a necessary party. But in the subsequent case of *Brown v. Weatherby* (b) the same learned judge, after argument and, apparently at least, after mature deliberation, allowed a demurrer for want of parties, because the heir-at-law had not been made a party. The report of *Bridges v. Hinxman* (c) is certainly very meagre and unsatisfactory. We are not furnished with the reasons for that decision. But the point is so simple that we can hardly see room for error; and there it was held after argument that the heir was not a necessary party.

In this conflict of authority we must consider the reason of the thing; and, looking to the growing importance of this jurisdiction, in relation to the administration of estates, we feel the necessity of rendering suits like the present as

(a) 7 Sim. 546.

(b) 12 Sim. 6.

(c) 16 Sim. 71.

1850. little cumbrous as possible, and are of opinion that the general interest will be best consulted by holding the heir-at-law not to be a necessary party, in accordance with the last decision of Sir *Lancelot Shadwell*, which is, so far as we are aware, the latest decision on the subject.

Fenny
v.
Priestman.

The rule requiring the heir-at-law to be a party in suits calling for the execution of the trusts of a will, is itself anomalous. We think that a departure from it in cases like the present, will be found practically convenient, and unattended with injury to the interest of the heir-at-law.

DAVIS V. SNYDER.

Agreement—Specific performance—Damages.

Where the owner of an estate stands by and allows a third person to appear as the owner, and to enter into a contract as such, the owner will be decreed specifically to perform such contract.

Where the owner of an estate was present and permitted a third person to agree for the sale of his land, and the purchaser was let into possession, who made improvements, and, being afterwards ejected by the owner of the property, filed a bill for payment of the value of those improvements. The court allowed a demurrer for want of equity.

Semle—That this court, in a proper case, has jurisdiction to decree compensation for improvements, where the vendor is unable to complete the title to the purchaser; but the court will not make such a decree, where specific performance of the contract can be compelled.

Statement.

The plaintiff in this case was the assignee of a bond executed by the defendant, and which was conditioned for the conveyance to the obligee of certain land therein described. The bill stated that the plaintiff had gone into possession under the bond and assignment, and had made improvements: and that he was afterwards ejected by one *Daniel Snyder*, to whom the plaintiff had conveyed the property before the execution of the bond. The principle statements of the bill are mentioned in the judgment of the court. The prayer was for an account of the value of the plaintiff's improvements, and for payment of the amount by the defendant to the plaintiff.

To this bill the defendant put in a general demurrer, which now came on to be argued.

Mr. *Mowat*, for the demurrer, besides several other objections to the frame of the bill, and the plaintiff's title to the relief prayed, contended that the bill was, in effect, a bill

for damages for non-performance of an agreement ; and such a bill would not lie. *Greenaway v. Adams*; (a) *Gwillim v. Stone*; (b) *Todd v. Gee*; (c) *Blore v. Sutton*; (d) *Clinan v. Cooke*; (e) *Newham v. May*. (f) If such a bill will in any case lie, it must, at all events, appear from it that the plaintiff cannot have a specific performance. The reverse appears here, for the defendant evidently gave the bond as trustee and agent for *Daniel Snyder* ; and the bill expressly states *Daniel Snyder* to have been a party to the agreement with the obligee, that the defendant should give the bond. *Sims v. Bond*; (g) *Higgins v. Senior*. (h)

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v.
Snyder.

Mr. Burns, contra.—The plaintiff being not the obligee, but his assignee, has no remedy at law for his damages, and must therefore be entitled to relief in equity. He is not bound to seek out the defendant's principal, or to treat the defendant as a mere agent for another. The defendant deceived the plaintiff by executing the bond as the principal, and must bear the consequences.

The judgment was delivered by

THE CHANCELLOR.—This case arises upon demurrer, and therefore the facts stated in the bill are all admitted. From the statement in the bill, it appears that the defendant had sold the lands in question to one *Abraham Latshaw*, and let him into possession, and received all the purchase money, and then conveyed the same premises to one *Daniel Snyder* in fee. This was in April, 1845, and on the 4th of August in that year *Latshaw*, the defendant, *Daniel Snyder*, one *Elias Snyder*, and one *Warnstedt*, to whom *Latshaw* had transferred his interest in the property, and who was then in possession, met, and under the advice of the plaintiff had a settlement of all matters pending amongst them ; upon which occasion it appeared that the defendant was indebted to *Latshaw* in about £11, and that *Latshaw* was indebted to *Daniel Snyder* in about £120, and to *Elias Snyder* in about £22, and thereupon it was agreed amongst them, under the advice of the plaintiff, that the defendant should give his bond to *Warnstedt* for a conveyance in fee

(a) 12 Ves. 395. (b) 14 Ves. 128. (c) 17 Ves. 278. (d) 3 Mer. 237.
(e) 1 S. & L. 25. (f) 13 Pri. 749. (g) 5 B. & Ad. 393. (h) 8 M. & W. 844.

1850.


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 Snyder.

Judgment.

of the lands in question, and that *Warnstedt* should give back to the defendant his own bond for the payment of about £131, which is represented as being composed of the residue of the debt of *Daniel Snyder*, after deducting the amount due to *Latshaw* by the defendant, which was to be paid by the defendant to *Daniel Snyder*, and the debt due from *Latshaw* to *Elias Snyder*. All these things are done, and *Daniel* and *Elias Snyder* and the defendant give receipts to *Latshaw*. The nature of this transaction is perfectly clear. *Latshaw* had money due to him from the defendant and from *Warnstedt*; these sums he appropriates to the payment of his own debts to *D.* and *E. Snyder*—the £131 to be paid by *Warnstedt* was evidently the whole or part of the purchase money to be paid by him for the land. The effect of this transaction was to make *Daniel Snyder* a trustee for securing to *Elias Snyder* and himself their respective debts, and subject thereto for *Warnstedt*; the defendant had no interest whatever, and was a mere trustee of the purchase money secured by *Warnstedt's* bond for *D.* and *E. Snyder*; the bonds entered into by *Warnstedt* and the defendant to each other, with the consent of *A. Latshaw*, in whom the whole beneficial interest was vested, operated as an effectual transfer of that interest to *Warnstedt*. It is quite obvious from this statement, which is contained in the bill itself, that no opposition could be made to a specific performance on behalf of the plaintiff, who stands in *Warnstedt's* place by *Daniel Snyder*, the defendant, or *Latshaw*.

Independently of these facts, and supposing *Daniel Snyder* to be the beneficial owner, it may be contended that he would be liable to a specific performance at the suit of the plaintiff on two grounds; one, that of agency, *Daniel Snyder* standing by and allowing the defendant, who would then be his agent, to appear as the owner, and enter into a written contract with *Warnstedt* in his own name; the other that of fraud, the real owner looking on and permitting a third person to appear as owner, and in that capacity to enter into a written contract with a purchaser, who binds himself thereby, and of course would have acted in a very

different manner had the real fact been disclosed to him. 1850.
In both these views of the case, it may be contended that *Daniel Snyder*, considered as the real owner, would be bound to make good the contract.

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v.
Snyder.

Without deciding whether in any case a court of equity can decree damages for the non-performance of a contract or payment of the value of improvements, when the vendor is unable to fulfil his contract, and the purchaser on the faith of the contract has made such improvements, (with respect to which, it is probable that if a case should occur to call for the exercise of such a jurisdiction, it would appear that the court was not destitute of power to afford the required relief,) it must be admitted that no occasion exists for the exercise of such a jurisdiction when the specific performance of the contract can be compelled, and complete justice can be done in that way; and as we are of opinion that this is a case of that description, it becomes unnecessary to decide the other question. The demurrer must be allowed, with costs.

SANDERS V. CHRISTIE.

Pleading—Practice—Receiver—Injunction—Costs.

A general charge in a bill, that the defendant, an executor and trustee, is committing waste on the testator's property, without specifying any act of waste, is not sufficient to sustain an injunction or a receiver. Jan. 4, 22.

Upon a creditor's bill, a receiver of the rents and profits of the testator's real estate will not be granted where the plaintiff does not allege in his bill, and clearly prove the insufficiency of the personal estate to pay the debts, and does not pray by his bill for the application of the realty, or the rents and profits thereof, to that object.

A defendant may move to dissolve an injunction without moving at the same time to discharge a receiver, previously appointed, of the funds to which the injunction related.

The court will entertain a motion to discharge an order for a receiver though such order was made upon notice.

Costs of motion may be given, though not asked for by the notice.

The bill in this case was filed by *Edmund Sanders*, one of the executors and trustees named in the will of the late *John Christie*, against the devisees, praying, amongst other things, for an account of certain moneys alleged to be due and owing by the testator to the plaintiff, an account of the personal estate, an injunction, and a receiver; the bill charged

Statement.

1850.

Sanders
v.
Christie.

that the executrix was wasting the estate of the testator, and incurring expense in unnecessary law proceedings, and that she was unfit to manage the affairs of the estate, of which she had taken possession; an injunction had been obtained *ex parte*, and a receiver afterwards appointed upon notice. The executrix having answered, denying the allegations of waste and incapacity, and of the testator's indebtedness to the plaintiff, a motion was now made by Mr. Read and Mr. R. Cooper for the defendants, to dissolve the injunction.

Mr. Turner contra.—The facts of the case, as also the points relied on and the cases cited by the respective counsel, are set forth in the judgment of the court, which was delivered by

THE CHANCELLOR.—This case involves several points of considerable practical importance. The utility, if not the absolute necessity, of the jurisdiction possessed by this court in administration suits, is becoming daily more apparent.

Judgment. Without the light of experience, we should have been led to the same conclusion *a priori*, whether from considering the condition of our society, or the state of the law upon the subject. The rapid growth of our commerce renders it peculiarly important, that this branch of our law should be explicit, and its administration as little dilatory and as inexpensive as possible. Courts of common law do not possess the machinery absolutely requisite for the useful exercise of such a jurisdiction; and, as might have been expected, the result of the decisions in the Court of Queen's Bench, in relation to the administration of assets was neither satisfactory to reason, nor practically convenient; and the legislation upon the subject has been so little directed by a comprehensive view of the matter as a whole, that we feel peculiarly anxious (so far as the legislature has empowered us) to render the course of procedure here simple and efficient.

The power, too, possessed by this court, of assuming the control of property, real as well as personal, by the appointment of a receiver, and of thus preserving it *in medio* until the determination of the right, although it sometimes wears an arbitrary appearance, and requires great prudence in

its exercise, is yet of vital importance to the administration of justice, especially so in this country; absolutely indispensable indeed, in many cases, to enable the court to secure to its suitors the fruit of litigation, when successful. The absence of this power in courts of common law, frequently renders verdicts there as useless as though the decisions had been adverse; but here, where alone specific performance of agreements can be enforced, this power is essentially necessary; and we believe that we shall better consult the true interest of suitors by extending this jurisdiction, wherever the principle of English decision, as applied to our law and condition, may seem to warrant such extension, rather than by the literal observance of precedents.

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At this stage, however, it would be inexpedient that we should prejudice points which will come before us more properly upon the hearing; and inasmuch as the application itself turns upon broad principles, and not upon any minute investigation of the pleadings, we shall confine ourselves to a very brief statement of the facts and allegations.

Judgment.

The plaintiff, in the first place, details a variety of transactions between himself and *John Christie*, the testator in the bill mentioned, commencing so far back as the year 1834; and he states the result of those transactions to be that the testator became indebted to him in a considerable amount.

The plaintiff next states various other dealings between himself and the testator, in relation to the purchase of several parcels of real estate, some portions having been contracted for by the plaintiff, and others by the testator, in the course of which it was agreed between them, that the purchase moneys then remaining unpaid should be furnished by the testator, to whom the titles should be made; the plaintiff, nevertheless, to be beneficially interested in one moiety of the lands so to be conveyed. The allegation is, that the testator failed to comply with these various contracts, and that the plaintiff is now entitled to have the same carried out.

It further appears, that the testator died about the 6th of February, 1848, having first made and duly executed his will, by which the defendant *Elizabeth Christie*, the plaintiff,

1850. and one *Clements*, were appointed executrix and executors, and also trustees; and that the will was duly proved by the plaintiff *Clements* and the executrix. It is alleged, however, that the executrix alone possessed herself of the personal estate, and entered into possession of the rents and profits of the realty. We do not find any acts of misconduct or misapplication of the assets stated in the bill; nor, indeed, any general statement that such is the case; but there is a charge in these words, "that the said defendant *Elizabeth Christie* has committed great waste upon the said testator's property, and is committing great waste thereon, and is incurring unnecessary expenses in law proceedings, whereby great loss has already accrued." And it is charged a little further on, that the defendant, *Elizabeth Christie*, is of a flighty and unsteady disposition, and not capable of managing the testator's estate."

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Christie.

Judgment.

There is no allegation that the personal estate has been exhausted, or that it is insufficient; on the contrary, the bill would seem to proceed upon the assumption that there will be a surplus.

The prayer is, that "an account might be taken under the direction of this court, of all and every the sum and sums of money due and owing to the plaintiff from the estate of the said testator, in respect of the matters in the bill mentioned, and also on account of the moneys laid out for the plaintiff by the testator; and that the balance due the plaintiff might be ascertained; and that an account might be taken of the personal estate, and the rents and profits of the realty, received by the defendant *Elizabeth Christie*, or which but for her default might have been received; and also of the personal and testamentary expenses and debts; and that the said personal estate might be applied in a due course of administration, in payment, so far as the same might extend, of the said expenses and debts; and that the clear residue might be ascertained, and the rights of all parties interested declared; and that the said executrix might make an inventory of the furniture, goods, chattels, and personal estate remaining in her possession, unapplied under the trusts of the will, to which

she is entitled for her life; and that said inventory might be signed by her, and deposited with the master of this court; and that it might be referred to the master to approve of security to be given by her for the due care and preservation of the same; and that the said executrix might be restrained from receiving the outstanding personal estate, or the rents and profits of the realty; and that the plaintiff might be declared entitled to a conveyance of a moiety of the real estate contracted for, and for other relief."

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Christie.

One cannot peruse this bill, of which we have given but an imperfect sketch, without being struck with the multifarious nature of the relief sought; and, whilst guarding ourselves carefully against being supposed to express any conclusive opinion adverse to the plaintiff's case, we feel it due to him, at this early state of the proceedings, to point to some of the difficulties which have suggested themselves. Can we advantageously proceed with a cause constituted as this has been, having reference to the peculiar nature of suits of this sort, and to the somewhat anomalous power exercised by this court, of directing a general administration, even upon a bill filed by a single creditor for payment of his own debt only? (a) Assuming the plaintiff to be entitled to combine in this suit all the relief which he seeks on his own behalf, can he at the same time call upon the court to settle the rights of the defendants, the devisees of *John Christie*? Is there any precedent for a bill by a trustee calling upon this court to ascertain the rights of his *cestuis que trust*, in the most unimportant portion of the trust property, (the residue of the personalty,) leaving their rights as to the realty, which are not only much more valuable, but much more difficult of arrangement, quite unsettled? Then, if this is to be regarded as a bill seeking payment of a simple contract debt out of the real estate of the testator, the proper constitution of such a suit will deserve serious attention, having regard to the decisions of the Court of Queen's Bench, upon the various questions which have

Judgment.

(a) Story Eq. Prac. page 103 and note, and cases cited; 1 Story Eq. Jur. page 557 and note.

1850. arisen upon the statute of Geo. II. (a) And in determining the latter point, the applicability of the English rule, in regard to a creditor filing a bill for payment of his own debt merely, will deserve consideration. (b)

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v.
Christie.

Judgment.

These questions have not been discussed; possibly a more attentive examination may relieve the plaintiff from any difficulty which they may now seem to present. But the case, in the aspect in which we are by this motion called upon to consider it, has certainly some peculiarity. The plaintiff is one of the executors and trustees named in the will of *John Christie*. He has proved that will, and accepted the trust. We pronounce no opinion upon the question, whether the legal estate has or has not vested in the trustees; but one cannot reflect upon the large discretionary power allowed to those persons, without becoming convinced that the testator reposed in them a confidence almost unlimited. Upon their determination depends the question whether the estate, real and personal, is to be continued in *statu quo*, or converted, and the proceeds invested for the benefit of the devisees. Upon their judgment the testator has unreservedly relied for the disposition of his estate, in the way which might be considered most advantageous for the objects of his bounty. And the testator having left to their discretion entirely, the amount of the allowance to be made to his children, proceeds to add the only direction with which his trustees have been fettered, in these words, "*with every due care that just, comfortable and sufficient maintenance shall be secured to my said wife.*" We do not mean to decide at present, that there is any thing in all this to deprive this plaintiff of such equitable rights as he may be entitled to as creditor of the late *John Christie*; but we may state, without doing any injustice to the plaintiff, that the hostile attitude which he has assumed in this litigation, has given to the proceeding a very peculiar, and not very favourable aspect. This lady has certainly reason, in a moral if not in a legal sense, to complain of those provisions of the law

(a) *Forsyth v. Hall*, Draper 304; the cases cited upon argument of the plea in *Simpson v. Smyth*.

(b) Mitford 166, [4th ed.] 1 Danl. C. P. 328, [2nd ed.] *Martin v. Martin*, 1 Ves. sen., 211; 1 Story Eq. Jur. page 557, note and cases cited.

(if indeed, these proceedings shall be found to be in accordance with the practice of this court) by which this trustee, while professing to discharge the important, almost sacred, trust reposed in him by the testator, has been enabled, through the medium of the extraordinary process of the court, to deprive her of that maintenance for which the will, under which she claims, so carefully provided; and by which she herself and her infant child have been left since December, 1848, to use her own language, "*utterly without means of living and entirely destitute of support.*"

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This plaintiff is, however, entitled to assert here his strict equitable rights, whatever they may be; and he is certainly not to be met by any other than a judicial interpretation of his conduct. But, allowing to the rights which he has asserted here their largest effect, we can discover nothing in the practice or principles of this court to warrant the course he has thought proper to pursue. With regard to personal property, it is well settled that this court will not interfere to deprive an executor or trustee of the administration of the estate upon slight grounds. (a) But here, after a careful perusal of the pleadings, we have been unable to discover a single allegation, directed either to the conduct of the executrix or the safety of the fund, which could justify the plaintiff in asking this sort of relief. There is found in the bill indeed a charge of the description before stated. We should not have regarded that as specific enough to have warranted us in acting upon it, and such as it is, it has been, we think, fully and satisfactorily met by the answer. Having incurred legal expenses unnecessarily is the only act stated in justification of the allegation of waste, as regards the personalty; but the executrix swears that, except in relation to this suit instituted by the plaintiff himself, no expense whatever, of the kind stated, has been incurred.

Judgment.

But if it be difficult to account for the course which this plaintiff has pursued in regard to the personal estate, it is, we think, quite impossible to account for, or justify, his interference with the rents of the realty. We are unable to

(a) Middleton v. Dodswell, 13 Ves. 268; 2 Wil. Exor. 1457.

1850. determine whether the plaintiff seeks the general administration of this estate, or only payment of his own debt. Some parts of the record would lead to the one conclusion, and other parts to the opposite. Neither can we conjecture (except from the fact of a receiver having been appointed) whether the plaintiff looks to the real estate for payment of this debt. We pronounce no opinion upon the question, whether the plaintiff is or is not entitled to that relief in a suit constituted as this had been; but there is no allegation in the bill, pointing to that as a necessary or even a probable result of this suit; and the prayer asks no such relief. The other devisees, too, though at one time parties defendant, have been by amendment omitted. We are informed, indeed, of some understanding on the part of counsel, to amend the bill in that particular. What that amendment may be, or when it may be thought advisable to make it, we know not. We can only deal with the record as we find it; and they certainly are not now before the court. In the state of things thus described, we are wholly unable to discover any principle upon which this plaintiff has sought to deprive this lady of the rents and profits of the real estate, the application of which, in payment of his own debt, has not been asked.

Judgment.

But had the bill prayed a sale of the real estate of the testator, still no case has been made for the appointment of a receiver. Though the court may and will take even that step against a devisee, and it is confessedly a delicate thing to do upon an interlocutory motion, yet reason and authority shew that it can only be done where the necessity of an after application of the realty in the payment of debts, has been made apparent. The personal estate is the primary fund. There must be allegation and clear proof that this fund will fail, in order to justify an interference with the rents and profits of the realty. But here, so far from finding any allegation or proof of that description, the bill proceeds upon the assumption that there will be a surplus, and asks this court to settle the rights of parties thereto. *Jones v. Pugh* (a) was cited to us as warranting this proceeding,

(a) 8 Ves. 71.

but it is a clear and strong authority against the plaintiff. We do not refer to that portion of the argument which turned upon the settlement. Had it been necessary now to determine that part of the case, recent authority is not wanting to show that the court would have felt great difficulty in appointing a receiver in the face of the allegations in the answer. (a) But we think it better to rest our decision upon the general principles we have stated.

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Christie.

It has been argued, however, that this application should have been to discharge the receiver, and that had such a motion been made, it must have failed, there being no precedent for an order discharging a receiver regularly appointed. No authority was cited for that position; and it would be strange, indeed, were any authority found for the statement, that this court, although interfering against a defendant in a way so material to his interest as by appointing a receiver, would not hear a motion to discharge that receiver upon the coming in of the answer. This jurisdiction, however necessary, is to the full as delicate as that respecting injunctions. An order appointing a receiver may have been wrong upon the facts before the court when it was made. It may be shewn to be wrong upon the facts disclosed in the answer. Why should the defendant be precluded from moving to discharge such an order? It is true, indeed, that few cases of the kind are to be found, because of the great care and consideration used before making such orders. But instances of appeal from orders of the sort are numerous, (b) and precedents for discharging a receiver are not wanting. (c)

Judgment.

Upon the whole, therefore, we find that this trustee, whose duty it was under the trusts of this will to have preserved his *cestuis que trustent* in possession of the personal property of the testator, unless so far as it might be required for the payment of debts, and whose further duty it was to have maintained those parties out of the rents and profits of the realty, we find that this trustee has deprived his *cestuis*

(a) *Lancashire v. Lancashire*, 9 Beav. 120; *George v. Evans*, 4 Y. & C. 211.
(b) *Fogarty v. Bourke*, 2 D. & W. 580, 1 C. & Law. 565.
(c) *Buxton v. Monkhouse*, Coop. 41.

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que trustent for a very considerable period of the enjoyment of the entire trust property, by means of the process of this court, and this for the purpose of securing a debt alleged to be due to himself, the existence of which is wholly denied by the answer. We do not know why the application for a receiver was not opposed. My learned brother who granted the order has informed us it was not. Nor do we perceive why this motion was not made to discharge the order for a receiver; or why both objects were not embraced in the same motion. But we feel that our duty is clear to grant the motion with costs. And we think that the plaintiff should consent to discharge the order for a receiver without the necessity of a further application.

Per Cur.—Motion to dissolve injunction granted, with costs.

Mr. *Turner* drew the attention of the court to the fact, that costs had not been asked by the notice of motion. In such case, he submitted that the invariable practice of the court had been not to give the party succeeding the costs of his motion, and referred to 18 Ves. 296. Had costs been asked for by the notice, the plaintiff would probably have offered no opposition, rather than run the risk of incurring costs by making any objection; on these grounds, he contended, the order made out to be varied as respected payment of costs.

Mr. *Read*, contra, contended that the rule with respect to costs was not inflexible; but that the court might in its discretion, in a proper case give costs, though not asked for by the notice, and referred to 4 Hare, 572.

Judgment.

THE CHANCELLOR.—In this case we made a motion for dissolving a special injunction absolute with costs, without having had our attention directed to the form of the notice of motion, which is silent as to costs. We are now asked to vary that part of our order because the applicant has not expressly asked that relief. Unquestionably the books of practice lay down the rule broadly as suggested; but so far as we have been able to discover, no authority is anywhere cited for the position except *Mann v. King*. (a)

(a) 18 Ves. 296.

Until the discussion of this matter, we all, I believe, conceived that the rule had been settled in accordance with *Mann v. King*, although we had no recollection that the point had ever been raised in this court. But on consulting the case in Vesey, we are of opinion that it lays down a rule by no means satisfactory. The practice at that date was confessedly unsettled, and the reason upon which Lord Eldon is supposed to have adopted that anomalous practice said to have been followed there, is so unsatisfactory, that we think some error must have crept into the report. His Lordship is made to say that "costs ought not to be given unless mentioned in the notice of motion, and then the motion is made at the peril of costs." The reasoning is quite unintelligible. Surely the applicant proceeds at the peril of costs, whether his motion do or do not ask that relief. If the motion fail, the court is in the daily habit of awarding costs according to circumstances, without reference to the form in which the applicant has thought proper to frame his notice.

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When the objection was made on a recent occasion, before a very able judge, in a case, too, closely resembling *Mann v. King*, Sir James Wigram observed, "*that did not signify. It had for a long time been considered unimportant whether the costs were mentioned in the notice.*"(a) We are of opinion that the English practice, as stated by Sir James Wigram, is more reasonable, and more in accordance with equity procedure, than the course pursued in *Mann v. King*; and as no contrary decision has been made in this court, *Powell v. Cockrell* must, we think, govern. We are of opinion, that there is no ground for varying that portion of our order which made the motion absolute with costs.

Judgment.

THIBODO V. COLLAR.

Foreclosure—Several mortgages.

Where a mortgagor had executed several mortgages, in one only of which his wife joined—the proper decree on a bill for foreclosure, against the widow and devisees of the mortgagor, is one in the usual form against them all—with a declaration that, upon payment of the mortgage executed by the widow, she should, if she chose, be let into her dower.

A mortgagee who holds several mortgages in fee on the same land, one of which is not due, cannot file a bill to foreclose that mortgage with the others.

(a) *Powell v. Cockrell*, 4 H. 572.

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This was a foreclosure suit. *Benjamin Olcott*, the owner of the property in question, executed three mortgages on it. The third was for £111 8s. 11d., and it alone was executed by his wife, (the defendant *Mary Olcott*,) and it was not due for some months after the bill was filed. All the mortgagees had assigned their mortgages to the plaintiff, and the plaintiff had sub-mortgaged to the defendant *Herchmer*; but this mortgage would not be due till some time hence. *Olcott*, the mortgagor, died, having by his will directed that his wife "should receive the full amount of dower to which, as his wife, she might be entitled from all his real and personal property." Among other bequests, the testator bequeathed £12 10s. to *Harriet Olcott*, and "the residue of his real and personal property, which might remain after the satisfaction of the before-mentioned bequests and the payment of all just demands, and the dower of the said *Mary*," the testator devised and bequeathed to certain persons named in the will. All the persons interested under the will, except *Harriet Olcott*, were defendants to the bill. The bill charged that *Harriet Olcott* resided, and was out of the jurisdiction of the court. The prayer was for the foreclosure of all the mortgages.

Statement.

The answers admitted the principal statements of the bill. The defendant *Mary Olcott*, by her answer, asked that she might be allowed the usual time for the redemption of the premises, and that she might be permitted to redeem them on payment of the third mortgage, to which alone she was a party, and that an account of what was due on that mortgage might be taken. The answers of the other devisees prayed for the usual time to redeem all. The answers admitted *Harriet Olcott* to be out of the jurisdiction. No evidence of that fact was gone into.

The case had been heard before his honour Mr. V. C. *Jameson*, and was now spoken to upon the minutes.

Mr. *Mowat* for the plaintiff, cited *Jones v. Griffith*, (a) and

Mr. *C. W. Cooper*, for the widow and devisees, urged that the bill should be dismissed with costs, as to the widow, because the only mortgage she executed was not due when the bill was filed.

THE CHANCELLOR.—We presume that evidence has been adduced of the assignments of the mortgages to the plaintiff, otherwise he has no *locus standi in judicio*. The defendant *Harriett Olcott* ought also to be proved to be out of the jurisdiction. (a) The court, however, can make a decree in her absence, but it will not be binding on her.

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This bill was, we think, multifarious as it regarded *Mary Olcott*, but she has waived this objection. In fact no cause of suit existed against her at the institution of the proceedings; and had she insisted on her dower, as she has done, and also insisted that no cause of suit existed in respect of the mortgage, in which she joined, the bill must have been dismissed, as to her, with costs. But she has adopted the suit as regards this mortgage, and claimed the benefit of it, and thereby became liable to the usual decree with costs; the suit not having been rendered more expensive than it otherwise would have been, in consequence of relief having been prayed against her as to all the mortgages, and not merely the one in which she concurred.

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The other defendants waive the objection arising from the third mortgage not having become due, when the suit was instituted, equally with *Mary Olcott*, and therefore the same decree must be made against them as to all the mortgages.

In the case of *Jones v. Griffith*, which was cited in the argument, two mortgages had been made for £300 and £100 respectively, which were binding on the widow. Three other mortgages were made to the amount of £800, which were not binding on her. Vice-Chancellor *Knight Bruce* pronounced the usual decree against the defendant, with a declaration that upon payment of £400, the widow was to be entitled to her dower. At first sight, it is not very apparent why a decree for redemption or foreclosure should be made against the widow as to the mortgages for £800, to which her claim to dower was paramount. We conceive it, however, to rest upon this ground, namely, that upon payment of the £400, the widow was entitled to have the whole mortgaged premises transferred to her, to hold until

(a) See *Michie v. Charles*, ante p. 125.

1850. that amount, less a sum proportionate to her interest, should be paid to her ; which could not be unless she paid the £800 as well as the £400, for the mortgagee could not be compelled to part with any portion of his security, until the whole amount due to him should be paid. Her right, therefore, to redeem the two prior mortgages gave her a right to redeem all the mortgages ; but at the same time she was entitled, if she chose, to be let into her dower, merely upon payment of the £400. Hence the peculiar form of the decree ; which seems to furnish a suitable precedent for the present case. Here, the widow, if she pays the £111 8s. 11d., ought to have the whole estate, for it was not merely her dower, but the fee-simple, which was mortgaged for securing this sum. But she cannot have the whole estate, unless she pays the whole amount due upon all the mortgages. She has a right, therefore, to redeem all the mortgages and to have the whole estate, to hold until she shall be reimbursed what she shall pay, less such part of the £111 8s. 11d. as shall be proportionate to her dower, or if she prefer it, she is entitled, upon payment of the £111 8s. 11d., to be let into her dower merely, and if the prior mortgages shall afterwards be satisfied, the premises must be conveyed to her, to hold until she shall be re-paid what shall remain of the £111 8s. 11d., after deducting a sum proportionate to her dower. The usual decree, therefore, must be made as to all the defendants, except *Herchmer*, with a declaration that upon payment of £111 8s. 11d. the widow shall be let into her dower. The defendant *Herchmer* may receive his money if he will, or it may be paid with his consent to the plaintiff ; if not due, and he will not receive it or consent to its payment to the plaintiff, it must be retained until it become due and be then paid, when he must re-convey. He must have his costs from the plaintiff, who will charge them upon the estate. The master has authority to allow to the widow in account such share of the rents and profits as she may be entitled to : the plaintiff having been in possession.

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Judgment.

MCNAB V. GWYNNE.

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Practice—12th order—Undertaking to speed—2nd motion to dismiss.

Under the 12th order of this court the plaintiff is bound to file a replication within one week from the date of entering into the usual undertaking to speed, whether a commission to examine witnesses shall be required by him or not.

In this case the plaintiff had entered into the usual undertaking to speed, (see ante p. 130,) and having neglected to file a replication for more than a week from that time, a second notice to dismiss was given. The plaintiff thereupon filed a replication, and

Mr. *Gwynne* now asked for the costs of the motion, which he contended ought to have been paid by the plaintiff when he filed his replication, at least so much thereof as had been then incurred. He contended that the second notice to dismiss was regular, and amongst other cases cited *Darby v. Smale* (a); *Daniell v. Austen* (b).

Mr. *R. Cooper*, contra, submitted that this was not a case for costs, even if the court be of opinion that the plaintiff was bound to proceed within a week, where no commission was required.

THE CHANCELLOR.—The defendant, some time since, moved to dismiss the plaintiff's bill for want of prosecution. The plaintiff having failed in a cross motion to amend, entered into the usual undertaking to speed. He neglected, however, to file a replication within the time limited by his undertaking, and the defendant, after the expiration of that period, served the plaintiff with a second notice of motion to dismiss. After service of the notice, but before motion, the plaintiff filed a replication, and the defendant now asked for the costs, consequent upon the second notice to dismiss. Judgment.

Upon the argument of this motion two points were made. It was contended, first, that according to English practice the time limited in the undertaking to speed governs all the steps to be taken, or at all events, *the filing of the replication*; that no contrary decision had been come to as far as the replication was concerned, and *Darby v. Smale* was cited as in point.

It was argued, secondly, that under the rule of this court,

1850. at all events the plaintiff must be held to perform every thing mentioned in his undertaking within the time limited, inasmuch as otherwise the defendant would be left without the means of urging on the cause, there being no regular terms, and therefore no periods within which to move according to English practice.

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Before considering the English practice, it may be observed, that under the orders of 1828, the plaintiff was bound to file his replication *before* entering into the undertaking. That practice was found to be inconvenient; and by the amendment in 1831, the words which rendered that step necessary *before* entering into the undertaking to speed were altered, and the filing of the replication was embodied in the undertaking, as one of the things *to be done* by the plaintiff. Now, in my judgment, the reasonable construction of the English order would have been, that the plaintiff had thereby undertaken to perform the different things there specified within the time limited, whether he did or did not require a commission. But unquestionably, if the true construction of the order be that the limitation of time is only applicable where a commission is required, then that construction must equally affect *all* the other acts to be performed. To hold, for instance, that where a commission is not required, the limitation of time would apply to the filing of the replication, although not to the service of the subpœna to rejoin, would seem palpably absurd. Now, in *Daniell v. Austen*, (a) the plaintiff had filed a replication, but had not served the subpœna to rejoin, and upon a second motion to dismiss, the plaintiff contended that he was not bound to take that step within the time specified in the undertaking, inasmuch as he did not require a commission. The Vice-Chancellor of England so determined, and held that the plaintiff could not be compelled to serve the subpœna to rejoin before the time fixed by the old practice, and the motion was dismissed. This construction has been followed by all the equity judges, though after the expression of doubt as to its soundness by several. Now, I cannot help thinking that case (followed as it has been by the

(a) 8 Sim. 19.

Lord Chancellor,) decisive of the English practice upon the motion now before us. If the undertaking be not an undertaking to serve the subpoena to rejoin within the time specified, where a commission is not required, neither can it be properly regarded as an undertaking to file a replication within that time. And if the plaintiff is not to be regarded as undertaking to file a replication within a limited period, unless he requires a commission, then is his undertaking general, to be performed within the time limited by the former practice. It is in fact a case taken out of the order. Such is certainly Mr. *Daniell's* opinion upon this decision. He says, that the case would be a surprise upon practitioners, inasmuch as the universal opinion had been that the time fixed by the undertaking applied, whether the plaintiff did or did not require a commission. And beyond doubt the passages in Mr. *Smith's* book, to which Mr. *Daniell* refers, quite corroborate his statement. The practice is so stated by Mr. *Smith*, without qualification. After a minute consideration of the rule of court, and the effect of *Daniell v. Austen*, Mr. *Daniell* observes (a) :—"The effect of this construction, however, is to leave the time within which the plaintiff is to file a replication pursuant to his undertaking completely indefinite;" and a little further on, "but as it has been decided by the case above, that the period of three weeks applies only to the latter branch of the undertaking, viz., to the obtaining and serving an order for a commission, and not to the preceding one, viz., to the serving a subpoena to rejoin, it follows of course that it cannot apply to the first, viz., to the filing of a replication; and as there are no other expressions in the 16th order to limit the period within which a replication must be filed, the consequence is, that there is no time fixed within which the plaintiff, if he does not require a commission to examine witnesses, is bound to perform the undertaking he enters into under the sixteenth order, so far, at least, as relates to the filing of his replication. For although the old practice of the court furnishes a period within which a plaintiff, having replied, must serve a subpoena to

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(a) Dan. 376.

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rejoin, which, according to *Daniell v. Austen*, is the period to be adopted under the new orders, no such period can be found, which either positively or by analogy, is applicable to the filing of a replication under such circumstances."

Mr. *Cooper* on the other hand, denies that any such opinion, as that stated by Mr. *Daniell*, had prevailed before *Daniell v. Austen*. He states that his own opinion upon the proper construction of the order, given long prior to the case in question, was in accordance with the judgment. And after a minute investigation of the cases, he says: "The author cannot help thinking that should a plaintiff, having undertaken to speed under the 16th order, *not proceed to file a replication for a term*, it will be discovered that there is a time within which the undertaking must be performed, and that the old practice does furnish a period applicable to the case." (a)

Judgment. Thus, both those eminent practitioners agree that where the plaintiff does not require a commission, the time within which he must file his replication as well as serve a subpoena to rejoin, must be determined by the old practice; and Mr. *Cooper*, who agrees with the decision of the Vice-Chancellor, only suggests that the defendant has a remedy *in case the plaintiff fail to file his replication within the next term*.

It is argued, however, that Mr. *Daniell's* book was published before the decision of *Darby v. Smale*, which is said to be exactly in point. But the second edition of Mr. *Daniell's* book was published subsequent to *Darby v. Smale*. That book is very highly spoken of. It was edited by Mr. *Headlam*, who is said to be intimately acquainted with the practice of the court, and I find there this passage (b): "It is to be observed, however, that a series of decisions established that no part of this undertaking applied to a case where the plaintiff did not require a commission to examine witnesses. The consequence of which was, that in such a case the defendant had no means either of procuring the bill to be dismissed, or of compelling the plaintiff to proceed

with it, other than those which the practice of the court, 1850. before the order of 1828, afforded him. It does not appear that the old practice assigned any limit to the period within which a replication must have been filed; so that, where a plaintiff did not require a commission to examine witnesses, and did not file a replication, the defendant had no regular means of urging the suit forward. Where, however, a replication was filed, the old practice gave to the plaintiff three terms, exclusive of the term in which the replication was filed, to serve his subpoena to rejoin." And a little further on—"After the service of a subpoena to rejoin, in a case where the plaintiff had not entered into an undertaking or required a commission, the plaintiff was precluded from moving to dismiss the bill for want of prosecution. The defendant must then have waited one clear term after the subpoena to rejoin was served, when he might have given rules to produce witnesses: he then had to wait another clear term, when he might give rules to publish depositions, although no witnesses had been examined. The defendant must then have waited another clear term, when he might have set the cause down at his own request, and served the plaintiff with a subpoena to hear judgment."

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One of the authorities cited to support these positions of Mr. *Daniell*, so opposed to the arguments of the learned counsel for the defendant, is this very case of *Darby v. Smale*. Upon such a point as that now under consideration, the books of practice are themselves authority. But having reference to the controversy excited by *Daniell v. Austen*, and the difficulty which that decision was thought to have occasioned, it is hardly possible to believe that the author of this text book would in his second edition have overlooked the decision or mistaken its effects. And, in my judgment, the case is clearly not opposed to, but in accordance, with *Daniell v. Austen*.

Upon the second branch of the argument, I am of opinion, that upon the true construction of the 12th order of this court, the limitation of time does apply to all the acts to be performed by the plaintiff, without reference to the question

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whether he requires a commission. I am of that opinion, because I think that construction as grammatical, and more reasonable than the one adopted in England. Because several considerations which no doubt led to the construction put upon the English rule, do not exist here. Because, in the absence of regular terms, the opposite construction would be highly inconvenient; and therefore, (where both constructions are possible,) in my judgment, highly unreasonable.

But, under all the circumstances, I am of opinion that this is not a case for costs, and the court ought not to make any order upon the motion.

JAMIESON, V. C., concurred.

Judgment.

ESTEN, V. C.—In this case, more than three weeks having elapsed after the answer was to be deemed sufficient without a replication having been filed, the defendant moved to dismiss the bill for want of prosecution, upon which occasion the plaintiff undertook to speed the cause. At the expiration of eleven days from the time of entering into this undertaking, no step having been taken by the plaintiff, the defendant moved again to dismiss the bill for want of prosecution; whereupon, after service of the notice, but before the motion was made, the plaintiff filed a replication. The plaintiff proceeded nevertheless with the motion, in order to obtain the costs of it; and the question is, whether he is entitled to them or not. It appears that, before the orders of 1828, if the plaintiff did not proceed for three terms after the answer, the defendant could dismiss the bill for want of prosecution, by a motion as of course.(a)

If the plaintiff filed a replication, and did not then proceed for three terms, the defendant could again move to dismiss, I presume, as of course; but after service of a subpœna to rejoin, no such motion could be made, but the defendant (after waiting for the several terms specified in the certificate of Mr. *Jackson*, referred to by the Vice-Chancellor in one of the cases which have been cited) could set the cause down at his own request to be heard, and serve the plaintiff with a subpœna to hear judgment. The orders of 1828 first introduced the method of entering

(a) *Degraves v. Lane*, 15 Ves. 291; *Pitt v. Watts*, 16 Ves. 126.

into an undertaking to speed the cause; for although it appears to have been given occasionally under the old practice, it could not have been recognised by it, inasmuch as the motion to dismiss was one of course, although from courtesy notice of it was generally given. It is probable, however, that when notice was given from courtesy, and the plaintiff appeared, the bill was retained on his undertaking to speed; and the impression may have grown up, that in that case he was allowed until the then ensuing term to file his replication. The undertaking required by the order of 1828 was to file a replication *forthwith*, which was construed to mean the same day on which the undertaking was given, if sufficient time remained for that purpose; and when such was the case, and the replication was not filed until the day following, although before the second motion to dismiss was made, the bill was dismissed.

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The 16th order of 1831, however, omitted the word "forthwith," and is in fact precisely the same as the 12th order of this court, upon which the present question arises. The language of those two orders is so completely identical, that it is impossible to put a different construction upon them; and therefore, the cases in England having settled that the limitation of time in the 16th order of 1831 applied only where the plaintiff wants a commission for the examination of witnesses, we must, I think, hold the same thing with regard to our 12th order. Both in England and here, therefore, the undertaking to file a replication is indefinite in point of time, unless it is affected by the rule mentioned by Mr. *C. P. Cooper*, in his reports, namely, that the replication must be filed under such circumstances in the then next term; but I incline against the existence of any such rule, because, not to mention other reasons, in the case of *Darby and Smale*, (a) cited in the argument, although it is expressly and pointedly brought under the notice of Mr. Vice-Chancellor *Wigram*, he does not act upon or even recognise it; whereas, had it existed, it would have applied so directly to that case that it would have prevented the motion from being granted to any extent. I consider there-

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(a) 1 Hare, 492.

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fore that, both in England and here, the undertaking to file a replication is general and unlimited as to time, and the defendant is in the same situation after it is entered into as he was before the motion was made, except that he has such an undertaking, which he had not then, whatever the value of it may be. It is quite clear that a second motion to dismiss cannot be made before the expiration of the three weeks in England, or the week here, inasmuch as if the plaintiff requires a commission, he is not obliged to file a replication, but within those times respectively. If, however, he shall suffer the three weeks, or one week respectively to elapse without filing a replication and suing out and serving a commission—in which case it is to be presumed that he does not require a commission—the question is, within what time must the replication be filed, or what means has a defendant to compel the plaintiff to file one, without which he cannot get on with the cause. My opinion, as I have gathered it from the decided cases, is, that the defendant must wait a reasonable time after the expiration of the three weeks, or one week respectively, and then, if a replication have not been filed, move again to dismiss; in which case, if no replication have been filed in the interim, I apprehend that the court may possibly order the bill to be dismissed, although this is very doubtful, or require the plaintiff to enter into a peremptory undertaking to file a replication, or make such other order as under the circumstances may seem expedient. But should the replication be filed after service of the notice, but before the motion is heard, the defendant will be entitled to the costs of the motion, but can have nothing more. This view of the practice is strongly confirmed by the case of *Darby v. Smale*, before mentioned, which in fact is on all fours with the present. There, the first motion to dismiss was made on the 2nd June. On the 27th, no replication having been filed, or commission sued out or served, notice was given of a second motion to dismiss, and the day before the motion was heard a replication was filed. Under the circumstances, the Vice-Chancellor considered the defendant entitled to the costs of his motion, and thereby affirmed his

right to move; in other words, he was of opinion that if the three weeks, limited by the 16th order, elapse, and three days more, the defendant is entitled to make a second motion to dismiss; for it is to be borne in mind that the three weeks expired on the 23d of June, and the second notice of motion was given on the 27th. It is impossible that an entire term could have expired in this time, and therefore it is that I consider the rule propounded by Mr. *C. P. Cooper* to be negatived by this judgment of the Vice-Chancellor. In the present case the week expired without any replication being filed, or commission being sued out or served; and on the fourth day afterwards, no replication having been filed, a second notice of motion was given, and the replication is filed on the day before the motion is heard. The case is, as I have already observed, on all fours with that of *Darby v. Smale*, and therefore I think that the same order ought to be made, namely, that the defendant should have his costs of the motion.

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EMMONS V. CROOKS.

Mortgage—Merger—Annuity—Usury—Pleading.

Where a third mortgagee, who took his mortgage without notice of the second mortgage, obtained an assignment to himself of the first mortgage, after he had notice of the second, and then purchased the interest of the mortgagor—*Held*, that under these circumstances, the second mortgage was the only subsisting incumbrance on the property.

A stipulation by a party to a deed that he will make certain specified payments, or in default that the other party to the deed may do so, and charge more than the legal interest thereon, is not usury. (*Semble.*)

An answer setting up a defence of usury, must be as particular in its allegations of the facts, as a plea of usury at law. (*Semble.*)

Quære: Whether the English annuity acts are in force in this country. But if they are, a bill to enforce an annuity deed need not allege the enrolment of a memorial as required by those acts; and a defendant cannot at the hearing take any objection for want of such enrolment, unless he has set up such defence by his answer.

The bill filed in this cause stated, that *John Goessman*, being seised in fee of the premises in question, executed an indenture by way of mortgage to *William H. Boulton*, for £370, and afterwards granted to the plaintiff a rent charge of £30 per annum; and by the same deed professed to convey the property in fee to secure the rent charge. That shortly afterwards *Goessman* executed a mortgage to Messrs. *Shaw & Turnbull*, for securing certain moneys,

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due them; and *Boulton* afterwards transferred his mortgage to *Shaw & Turnbull*, who had at this time notice of the incumbrance held by the plaintiff. *Goessman* subsequently became bankrupt, and *Shaw & Turnbull* presented a petition to the judge of the Bankrupt Court, praying for a sale of the premises in question, which was ordered; and Messrs. *Shaw & Turnbull* became the purchasers, and the estate was conveyed to them. They in about a year afterwards sold and conveyed to the defendant, who had also full notice of the incumbrance held by the plaintiff.

The bill prayed that plaintiff might be declared the first incumbrancer, an account of the amount due for arrears and payment, or in default a sale subject to the annuity.

The answer of the defendant did not displace any of the equities set up by the bill.

Argument.

The cause coming on for hearing, Mr. *Mowat* and Mr. *Ewart*, for the plaintiff, contended that under the circumstances here appearing, it must be taken that the rent charge of the plaintiff was the only incumbrance on the premises, the dealings with the estate set forth in the pleadings having affected a merger of all the other incumbrances in the inheritance of which the defendant, and those through whom he claimed, became possessed, with full notice of plaintiff's charge thereon, and referred, amongst other cases, to *Toulmin v. Steere*; (a) *Burrowes v. Molloy*; (b) *Garnett v. Armstrong*; (c) *Waring v. Ward*; (d) *Perry v. Barker*; (e) *Smith v. Phillips*; (f) *Parry v. Wright*; (g) *Brown v. Stead*. (h)

Mr. *Turner* and Mr. *Morphy*, for the defendant, contended—1st. That there is no rent charge existing, it having become merged in the fee conveyed to the plaintiff by the same deed, and which grants the charge. 2ndly. That if it be an annuity, it is void on the ground of usury. And 3rdly. That the 17 Geo. III., ch. 26, is in force in this province. By that statute, a memorial of the conveyance creating the annuity must be enrolled; and that here, no enrolment having taken place, the annuity is void.

(a) 3 Mer. 224.	(b) 2 J. & La. 526.	(c) 2 C. & Law. 458.
(d) 7 Ves. 337.	(e) 8 Ves. 527	(f) 1 Keen. 694, 699, n. a.
(g) 5 Russ. 144, 1 S. & S. 373.	(h) 5 Sim. 535.	

The plaintiff admits that *Shaw & Turnbull* had not any notice of plaintiff's incumbrance when they took their mortgage. They had, therefore, a right to tack the first and third incumbrance together. The third mortgage could not merge in the first, because of the second intervening; and they offered to waive the purchase of the equity of redemption, citing *Patch on Mortgages*, 365; *Mocatta v. Murgatroyd*; (a) 1 Powell on Mort. 489, note.

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Mr. *Mowat*, in reply, contended that the annuity acts were not in force in Upper Canada; that a grant of an annuity out of an equity of redemption was not within the statute cited by the defendant; and that objection, if otherwise good, could not be sustained because not taken by the answer. As to the objection of usury, he cited *Murray v. Harding*. (b)

THE CHANCELLOR.—It appears that *John Goessman* was seised in fee simple of the premises in question in May, 1842, and by indenture of that date between himself and one *Boulton* he conveyed the same to *Boulton*, in fee simple to secure a sum of £370. Judgment.

Whilst the legal estate was outstanding in *Boulton*, *Goessman* contracted with the plaintiff in this cause, for the sale to him of a rent charge of £30 for the lives of three persons and the survivor, to be issuing out of the same premises, for the sum of £200. By indenture, dated in May, 1844, the premises in question were conveyed to the plaintiff, in pursuance of that agreement, subject, nevertheless, to *Boulton's* mortgage. *Goessman* and the plaintiff were the only parties to this indenture, no trustee having been interposed on behalf of *Emmons*, according to the usual form.

In December, 1844, *Goessman* having become indebted to *Shaw* and others in a sum of about £425, proposes to convey the premises in this cause to those gentlemen, to secure that debt; and by indenture of even date, between *Goessman* of the one part, and his creditors of the other, the grantor affects to convey the premises in question to them in fee simple by way of mortgage. No notice is

(a) 1 P. W. 394.

(b) 2 W. B. 859; S. C. 3 Wil. 390.

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 Crooks. between the same parties was executed in April, 1845, for the purpose of securing a further debt, but as that instrument has no material bearing upon the questions in the cause, it need not be further noticed.

By indenture between *Boulton* of the one part, and *Shaw & Turnbull* of the other part, bearing date the 26th day of April, 1845, *Boulton* transfers to Messrs. *Shaw & Turnbull* the balance of his mortgage debt, about £170, and conveys to them the premises in question, subject of course to redemption. These several deeds were registered in the order of their execution, and about the periods they bear date.

Judgment. A commission of bankruptcy was duly issued against *Goessman* in July, 1845, under which Messrs. *Hales & Beekman* were appointed assignees; and in September of that year Messrs. *Shaw & Turnbull* presented their petition to *Robert Easton Burns*, Esquire, the commissioner acting in the matter, setting forth their several securities, and praying that the real estate included therein might be sold, and the proceeds applied in discharging their mortgages; and that the petitioners might be admitted to prove for the balance. The estate in question in this cause was sold by the assignees of *Goessman*, under an order made upon this petition, and Messrs. *Shaw & Turnbull* became the purchasers; and by indenture, dated the 3d day of January, 1846, and made between *Hales & Beekman*, assignees of *Goessman* of the first part, and *Shaw & Turnbull* of the second part, the premises in question were conveyed to the latter in pursuance of the sale made under the order in bankruptcy. This indenture recites the mortgage to *Boulton*, both mortgages to *Shaw & Turnbull*, the assignment from *Boulton* to them, their petition in bankruptcy, and the sale thereunder.

By indenture between *Shaw & Turnbull*, of the one part, and the defendant of the other part, and bearing date the 10th day of August, 1847, the parties of the first part convey the premises in question to the defendant in fee simple, in consideration of £500. The conveyance contains no statement of the title. It is without recital.

The bill charges, that Messrs. *Shaw & Turnbull* had notice of plaintiff's incumbrance before they purchased *Boulton's* security, and that the defendant also had notice before the execution of the deed to him; and prays a declaration, that, under the circumstances, the plaintiff's rent charge is the first incumbrance on the premises, an account of what is due on the foot of it, and, in default of payment thereof, a sale.

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The answer states, that Messrs. *Shaw & Turnbull* had no notice of any incumbrance upon the premises in question at the period of the execution of their securities, but admits that they had notice at the time that *Boulton's* interest was assigned to them. It also admits that *Crooks* had notice of the plaintiff's claim before the execution of the indenture under which he makes title. It sets forth the proceedings in bankruptcy upon the petition of Messrs. *Shaw & Turnbull*, and relies upon the indenture of January, 1846, as constituting a good title, discharged of the plaintiff's incumbrance, under 7th Victoria, chapter 10. The answer further asserts, that the dealing between the plaintiff and *Goessman* was in fact a loaning of money, and not the sale of an annuity; and that the indenture under which the plaintiff claims is void under the statutes against usury.

Judgment.

Upon the hearing, the learned counsel for the defendant declined to argue the defence set up by the answer, upon the legal effect of the deed from the assignees of *Goessman*. He admitted, that the instrument alluded to has no such effect as that attributed to it by the learned gentleman who drew the answer in the cause. It was contended, however, that the plaintiff is not entitled to a decree upon these grounds—first, because the annuity deed is void, no memorial having been enrolled; secondly, because it is tainted with usury; and, lastly, that the various incumbrances executed by *Goessman* must be regarded as subsisting in favour of this defendant, and entitled to payment in priority to the plaintiff's annuity; which last point was the one principally relied upon.

We do not find it necessary to determine the question whether the imperial acts referred to are in force in this

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province. The law of England was introduced here by a statute (a) so general in its language, as to render the occurrence of questions of this character highly probable; and the difficulty of their determination has not been lessened either by subsequent legislation or judicial decision. The various provisions of the legislature in regard to the enrolment of deeds of bargain and sale, and the determination of the Court of Queen's Bench in relation to the Statutes of Mortmain, would seem to furnish analogies in favour of the defendant's proposition, had the objection been stated in the pleadings; but no such objection is to be found there. The enrolment of a memorial in annuity transactions, is not necessary at common law. It is matter collateral to the grantee's title, and only rendered requisite by statutory provision. The plaintiff, therefore, was not required to state the fact of enrolment in his bill; but the defendant, to entitle himself to take advantage of any defect in this respect, must have disclosed it in his answer. (b)

Judgment.

The objection to this plaintiff's case on the ground of usury, as I find it in the answer, is this, that the transaction, though in form the purchase of an annuity, was in substance a loan at usurious interest. But the learned counsel for the defendant urged a further objection upon the argument, namely, that the plaintiff in this contract had stipulated for the repayment of certain specified charges with interest "*after the rate* aforesaid;" but there being no rate of interest other than that which would result from considering the annuity as interest, the defendant argued that *that* rate must have been intended, and that inasmuch as *it* exceeded the legal rate, the whole transaction was void. This latter objection has not been noticed in the pleadings. We give no opinion upon the question, whether the statement in the answer is sufficiently explicit to warrant the court in sustaining the former objection, though borne out by evidence. Neither shall we decide whether it is competent to him now to urge that which he has not put in issue. Unquestionably, as was said by Sir A. Hart, when Lord Chancellor of Ireland, "usury is at law fraud in equity." (c)

(a) 32 Geo. III., ch. 1, secs. 3 & 6. (b) Dunn v. Calcraft, 2 S. & S. 56.

(c) Moore v. McKay, 2 Mol. 136.

The legislature has furnished courts of law with very large powers to reach cases of this sort. If those courts to which the jurisdiction more properly belongs, have found it expedient to exact great particularity of allegation, we can discover no good reason why courts of equity should sanction the looseness of statement (and, as regards the latter objection, the total absence of allegation) discoverable in this answer. But we express no decided opinion upon these points, because, independently of them, and assuming the answer to be sufficient in form, we think that the defendant has entirely failed to establish either objection. As to the former, the evidence is wholly insufficient. Instead of finding the usury clearly established, which alone could warrant us in pronouncing the deed void, such a determination would seem to us to rest upon mere conjecture. We are further of opinion that the second objection is not well founded. We are by no means clear that the parties intended to stipulate for the re-payment of the charges alluded to at usurious interest. The deed, it is true, says that they are to be re-paid "with interest after the rate aforesaid;" but if the deed have in fact fixed no rate of interest, then the words, upon which the argument has been founded, would be surplusage. The covenant would be for re-payment at the legal rate. The expression may have been introduced by mistake. No issue has been raised, and no evidence adduced. How can we pronounce the deed to be void? But had the plaintiff stipulated for the re-payment of these contingent demands, under the penalty of being subject to interest beyond the legal rate in case of default, as has been argued, we are of opinion that such stipulation would not have the effect of avoiding this deed. Loan and forbearance are both necessary to constitute usury. Here is neither. The grantor indeed covenants to make certain payments, and that upon default the grantee shall be allowed to make them. Whether the plaintiff ever would have availed himself of the permission reserved in the deed for his own protection, must have been quite problematical at the time of the execution of the instrument. Whether he has in fact done so we have now no evidence.

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1850. But it was always in the power of the grantor to have prevented any claim under this clause by the due fulfilment of his covenant. To have secured the observance of such a covenant, under the penalty of paying excessive interest, would not have been usury.

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Upon the last point, we are of opinion that the defendant has no right to set up the mortgages to *Boulton* and *Shaw* as subsisting securities, inasmuch as those charges have merged; and that the plaintiff's annuity is therefore the only subsisting incumbrance. It is matter of regret that we have not been able to procure a copy of the judgment of the Court of Appeal, in the case of *Street v. The Commercial Bank*. The judgment pronounced in that case has unfortunately been lost; but I have a note of the opinion delivered by the learned Chief Justice, which is in accordance with the decree we are about to pronounce. In that case, one *Richardson* had mortgaged the premises in question in the cause to *Street* in fee, for £600. He subsequently conveyed the same premises to the *Commercial Bank* in fee, to secure £5000; and then conveyed to *Street* in fee, for £1500. *Street* had no notice, actual or constructive, of the mesne incumbrance at the date of the last deed. The *Commercial Bank* filed a bill of foreclosure against *Street*, treating him as the absolute owner. *Street* contended that his mortgage for £600 was a subsisting security; and that inasmuch as he had advanced his money upon the second conveyance, without knowledge of the mortgage to the *Commercial Bank*, he was entitled to tack the debt due thereunder to his original mortgage of £600, and to claim payment of the whole in priority to the mortgage of the *Commercial Bank*. The court determined that there was no merger. The Chief Justice cited and relied upon the case of *Forbes v. Moffatt*, (a) to shew that the question of merger depended upon intention; and he distinguished the cases then cited in argument, which were the same now cited to us, upon the ground of notice, and determined that *Street* was entitled to treat the mortgage for £600 as still subsisting, inasmuch as he had no notice of the mesne incumbrance at the date of the

(a) 18 Ves. 385.

last deed, and that he was for the same reason entitled to the payment of his whole debt in priority to the bank. Whether *Forbes v. Moffatt* is indeed an authority for the proposition which it was assumed to prove; whether that class of cases, where the inheritance comes to the party having an incumbrance by descent or devise, must not be distinguished from cases like *Street v. The Commercial Bank*, and the present, where the inheritance has been acquired by contract; whether reason and the authorities do not establish that the burthen of proof should rest in the one class upon the party asserting a merger, and in the other upon the party denying it, we do not now decide, because we are not about to determine any thing inconsistent with the case in appeal. On the contrary, the present case falls clearly within the authority of *Street v. The Commercial Bank*. Here both *Shaw* and the defendant had clear notice of the plaintiff's incumbrance, before entering into the contracts under which they acquired the inheritance. We are not aware of any decided case opposed to the conclusion at which we have arrived. It is worthy of remark that Sir *Edward Sugden*, to whose judgment, in *Garnett v. Armstrong*, (a) we were referred, argued with distinguished ability against the merger, in the leading case of *Parry v. Wright*, (b) as well before the Vice-Chancellor as when it came before Lord *Lyndhurst* upon appeal, (c) and yet his judicial enunciation of the rule, in *Garnett v. Armstrong* is clearly in accordance with *Parry v. Wright*.

But the circumstances of this case, as detailed in the pleadings, leave, we think, no room for controversy. Here *Shaw*, with a full knowledge of the plaintiff's annuity, petitions for a sale of the estate, in order to pay off his incumbrances; and the defendant sets up, in his answer, that upon the sale made under that petition *Shaw did acquire the inheritance*, free from all incumbrance. Now, whether we regard this transaction as payment of those charges, which cannot now be set up again under *Toulmin v. Steere* (d); or as an acquisition of the inheritance, as in *Parry v.*

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(a) 2 C. & L. 458. (b) 1 S. S. 373. (c) 5 Russ. 142. (d) 3 Mer. 210.

1850. *Wright*, we cannot doubt that the parties have manifested a clear intention to merge these charges, and that it is therefore impossible for the court to give effect to the deeds in question, contrary to that intention.

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It has been argued, however, that it is competent to the defendant to waive his purchase of the equity of redemption; (a) and upon the hearing, his counsel expressed his readiness to do so. But assuming that it would have been competent to *Shaw* to have adopted that course, it assuredly is not open to the defendant. His only conveyance is a deed in fee simple from *Shaw*. What does he waive?

Judgment.

But we are further of opinion, that no such course would have been open to *Shaw*, had he been defendant. *Shaw* having become party to a contract which has had a material effect upon the interest of the plaintiff, necessarily accelerating his claim, constituting it in fact the sole charge upon the estate, we are at a loss to discover how the defendant could be permitted at the hearing to waive his rights under such contract, and thus to defeat the object of the suit. But *Brown v. Stead* (b) is an authority in point.

ANONYMOUS.

Enrolling decrees.

It is not necessary to petition for leave to enrol decrees, after any lapse of time.

Several petitions had been presented to the Chancellor, out of court, for orders to enrol, *nunc pro tunc*, the decrees in the several causes, more than six months having elapsed since the passing of them. In reference to these petitions, the Chancellor stated, that, under the orders of this court, it was not necessary to petition for leave to enrol a decree, *nunc pro tunc*.

(a) *Moccata v. Murgatroyd*, 1 P. W. 394. (b) 5 Sim. 535.

IN THE EXECUTIVE COUNCIL.

1844.

[Before the Hon. John Beverley Robinson, Chief Justice ;
the Hon. J. B. Macaulay, Ex. C. ; the Hon. Jonas Jones,
Ex. C. ; and the Hon. Mr. Justice Hagerman.]

ON AN APPEAL FROM A DECREE OF HIS HONOUR THE VICE-CHANCELLOR OF
UPPER CANADA.

Between SAMUEL STREET, *Appellant*,

AND

THE COMMERCIAL BANK OF THE MIDLAND DISTRICT, (*a*)

Respondents.

Mortgage—Priority—Registration.

Where a party held a mortgage upon lands, and the mortgagor having afterwards become indebted to the mortgagee in a further sum of money conveyed the lands to him in fee, and some days afterwards the grantee gave the mortgagor a bond to reconvey upon payment of the whole debt. *Held*, that the grantee was entitled to hold the premises as a security for the whole of his debt as against a mesne incumbrance which had been created thereon between the time of his obtaining the mortgage and the conveyance to him in fee, but of which he had not had notice before the execution of the conveyance under which he claimed.—*Held also*, that registration is not notice in this country.

April 4, and
June 24, 1844

It appeared from the pleadings in this case that, on the 12th December, 1831, one *William Richardson* (a defendant in the court below) having become indebted to Messrs. *Clark and Street* in £600, executed a mortgage in fee for a lot of land in Brantford, and 200 acres in Southwold. (Registered 7th January, 1833.) Also that, on the 8th of May, 1838, *Richardson* having become indebted to the Commercial Bank in £4,945 16s. 0d., executed a mortgage in fee to the bank, embracing the lands in Brantford already mortgaged to *Clark and Street*, and other lands of great value. (Registered in August, 1838.)

Statement.

That Mr. *Clark* had since died, and appointed *Street* executor of the will, who had since become entitled to the

(a) The judgments in this case having been found after the decision was pronounced in *Emmons v. Crooks*, (see p. 166, ante,) the Reporter has taken the earliest opportunity of giving to the profession a full report of the case, in consequence of the general importance of some of the matters discussed in it.

1844. whole of the property held by him and *Clark*; and that *Richardson*, having become indebted to *Street* in the further sum of £900, did by an indenture of bargain and sale, dated 7th November, 1839, convey the land in Brantford to *Street*; and that *Street*, by a bond dated 13th November, 1839, bound himself to reconvey on payment of £1520 3s. 5d.; and further, that for better securing *Street*, *Richardson*, by a deed of bargain and sale, dated 19th November, 1839, conveyed the fee simple of the lot of land in Southwold and a town lot in the village of Vienna (the lot in Vienna having been included in the mortgage to the Commercial Bank) to *Street*, for which no bond to reconvey was given; the several deeds were duly registered according to their priority of dates.

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The defendant, by his answer, stated that both the deeds, of 7th and 19th November, were intended as mortgages on the lands, and that he had not had notice of the mortgage given to the Commercial Bank.

The decree of the court below was to postpone *Street* till the Commercial Bank was paid.

Statement.

From this decree of the Vice-Chancellor, *Street* appealed; and on the cause coming on to be argued in this court,

Mr. *Esten* and Mr. *Brough* for the appellant, claimed the whole amount of the two mortgages, as mentioned in the bond, (£1520 3s. 5d.,) in preference to the Commercial Bank, on the following grounds:

Street having the legal estate under the first mortgage and having received the second mortgage without notice of the intermediate incumbrance, they can add or tack the second to the first mortgage, and thereby exclude the intermediate charge. In this view of the case, the only question that can arise is, whether they had notice of the incumbrance of the Commercial Bank, at the time of the second mortgage to *Street*. In the first place, notice is not charged, and therefore it must be taken not to exist.—*Parry v.*

Wright. (a) In the next place, notice is not proved. It is not pretended that *Street* had actual notice, but it is said he

had *constructive* notice, from the fact of registration; but registration, they submitted, is not notice, the provisions of the act of this province with regard to registry being the same as the English Registry Acts.—*Bedford v. Backhouse*, (a) *Wrightson v. Hudson*, (b) *Morecock v. Dickins*, (c) *Pentland v. Stokes*. (d)

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In Ireland, tacking cannot exist by reason of the 4th clause of the Irish Registry Act, (e) but this provision is not embodied in our provincial statute; and even under this clause, the fact of registry is not considered notice—*Bushell v. Bushell*, (f) *Latouche v. Lord Dunsany*, (g) *Underwood v. Lord Courtown*. (h) They therefore claimed the whole amount of the debt; but if the court considered that there existed notice, then the first debt of £600 with interest. If it be contended that *Street* must be postponed altogether, because he had purchased the equity of redemption, and that the first mortgage consequently sunk or merged in the fee, the answer is, that the transaction was a mortgage and not a purchase. The doctrine of merger is confined to cases of actual purchase, as distinguished from mortgages, and to cases in which the *puisne* encumbrancer does not keep the first charge on foot, but simply removes it out of his way.—*Toulmin v. Steere*, (i) *Parry v. Wright*.

Statement.

Here the evident intention of the parties was to create a mortgage, which kept the original debt on foot, instead of extinguishing it, and no intention existed of removing the first incumbrance out of the way, but the intention was to add the second to the first.—*Baker v. Wind* (k). However, admitting that the second transaction was a purchase, the legal estate outstanding under the first mortgage protects *Street* from all mesne incumbrances of which he had not notice, so that even on this supposition the respondents will be obliged to contend that registration is notice. (l)

Should it be objected that the accepting of the second conveyance involved the repudiation of the first, the answer is, that the debts do not appear to be the same, except from

(a) 2 Eq. Ca. Ab. 615, Pl. 12.

(b) 2 Eq. Ca. Ab. 609, Pl. 7; 3 Sug. V. & P. 369 and 370.

(c) Amb. 678.

(d) 2 B. & B. 68, 72. (e) 6 Anne, ch. 2.

(f) 1 S. & Lef. 103. (g) 1 S. & Lef. 157. (h) 2 S. & Lef. 64.

(i) 3 Mer. 210.

(k) 1 Ves. Sen. 160. (l) Coote, 68; Bythe, 382.

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1844. a part of the answer which was not read at the hearing; but if they are the same, no intention of repudiation existed; and in the absence of such intention, it could not happen. Such an arrangement as appears here to have been entered into, is of common occurrence in England on transfers of mortgages, but is never held to effect the old mortgage or its priority. (a) Even if such an intention did exist, the appellant could not thereby be placed in a worse situation than if he had advanced the money for the first time when the second conveyance was executed. In such a case, not having had notice of the intermediate mortgage, he could avail himself of the legal estate under the first mortgage to exclude the mesne incumbrancer. *Brace v. Duchess of Marlborough*, (b) *Hawkins v. Taylor*, (c) *Belehier v. Butler*, (d) *Exp. Knott*, (e) *Maundrell v. Maundrell*, (f) *Frere v. Moore*. (g) But assuming the second conveyance to be a mortgage, and which it is contended it is, and it be objected that the second debt to *Street* was not an advance made on the credit of the land, and that therefore the second mortgage was not capable of being tacked to the first; the answer is, that the consideration for the mortgage to the respondents was precisely the same, and therefore the equities of the parties are equal; and as the rule is, *equitas sequitur legem*, the appellant having the legal estate in him under the first mortgage, can tack his second charge to it, and postpone the respondents until his whole demand is paid.

Statement.

Mr. *Burns* and Mr. *Blake* for the respondents.—We contend that there is no debt proved, that is, no subsequent debt capable of being tacked to the first mortgage; if there be a subsequent debt, it is not shewn that the money was advanced on the credit of the land; and to constitute it such a debt as could be tacked it must be shewn to have been so advanced. The deeds and bonds are evidence of a debt only as between *Street* and *Richardson*, but not as against the bank. The absolute conveyances of the 7th

(a) 6 Bythe, 269, 270. (b) 2 P. W. 491. (c) 2 Vern. 29. (d) 1 Eden. 523.
(e) 11 Ves. 619; 5 Bythe, 447 m. (f) 10 Ves. 271. (g) 8 Price, 475.

and 19th November, 1839, operated as a release of the equity of redemption; and *Street* is now estopped from setting up the legal estate vested in him by the mortgage of 1831.—*Exp. Hooper*; (a) *Shepherd v. Titley*; (b) *Higgins v. Liddel*; (c) *Mackreth v. Symmons*; (d) *Powis v. Corbet* (e) *Price v. Fastnedge*; (f) *Exp. Petit*. (g) The bond from *Street* to *Richardson* would make the transaction a mortgage as between them, not as to third parties: the intention of the parties at the time of the execution of the second conveyance went beyond a mortgage—it was a purchase, with an agreement to re-convey; therefore the mortgage is extinguished.—*Cotterell v. Purchase*; (h) *Baker v. Wyld*. Registration is notice in this country, as it is in the American States; the bank relied upon its being notice, and in this country it has always been considered such; and as Lord *Camden*, in *Morecock v. Dickens*, had decided that registration was not notice, in consequence of many of the most valuable estates in the kingdom having been purchased depending upon former decisions of the court, whereby it had been held that registration was not notice, but that his own opinion was different—so in this country; as almost all the titles that have been acquired have been so, depending upon registration *being constructive* notice, the same argument may be made use of in *favour* of its being considered by our courts to be so. (i)

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Argument.

But should it be decided that the second transaction was only a mortgage, and that registration is not notice; then it is contended that the Registry Act of this province, being “*for the better securing and more perfect knowledge*,” &c., prevents tacking as effectually here as the statute 6 Anne, chap. 2, in Ireland, which does not *expressly*, but *impliedly*, take it away. (j)

And as the doctrine of tacking does not prevail in this country the appellant cannot avail himself of his prior legal estate.

(a) 1 Mer. 7.

(b) 3 Atk. 352.

(c) 1 Ch. Ca. 140.

(d) 15 Ves. 336.

(e) 3 Atk. 556.

(f) Amb. 685.

(g) 2 Gl. & J. 47;

(h) For. 61.

(i) 1 Story, Eq. Jurisp. 402; 4 Kent, 467; 2 Johnson's Reports, 510; 1 Johnson's Ch. Ca. 288, 399.

(j) See Lord Redesdale's judgment in *Latouche v. Lord Dunsany*.

1844. *Street v. Commercial Bank.* ROBINSON, C. J.—Two questions have been argued in this case; one of them, depending on the doctrine of tacking securities maintained in English courts of equity; the other, independent of that doctrine.

The respondents—the *Commercial Bank of the Midland District*—in the course of transactions not in any respect impeached, took a mortgage from *William Richardson*, on the 8th of May, 1838, to secure a debt of £4945 16s., payable in four equal instalments with interest; the last of which was to become due on the 1st of November, 1840. And, no part of this debt being paid, according to the condition, on the 1st of November, 1840, they filed their bill of foreclosure; and afterwards, by amending their bill, made the appellant *Street* a party, on account of his claiming an interest in part of the mortgaged premises, that is to say, in lots 3 and 4, on the north side of Colborne street, in the town of Brantford, and lot No. 1, in the 2nd range of lots in the village of Vienna. In their bill the respondents pray to have the mortgaged premises sold, under the direction of the court, to pay their debt, and the surplus arising from the sale paid over to *Richardson*, the mortgagor, or such person as the court should direct.

Judgment.

The appellant, in his answer, claims a right to satisfaction as prior incumbrancer with the late *Thomas Clark* upon the lots in Brantford and the lot in Vienna. 1st. To the amount of £600, being a debt secured by two mortgages, given 12th December, 1831, antecedent to that given by *Richardson* to the respondents, and on that account clearly entitled, as he insists, to priority. 2ndly. To the amount of a large sum beyond that, being for moneys advanced by *Clark* and *Street* after the taking of these mortgages, which moneys advanced by them to *Richardson* amounted in all, on the 13th of November, 1839, to £1520 3s. 5d., including the £600 secured by the mortgages of the 12th December, 1831, and the interest thereon. And the appellant claims to be the prior incumbrancer of the lots in question in regard to these further moneys advanced, as well as for the first debt of £600, upon the ground that such moneys were secured to him as the surviving partner of

Clark and Street, and as executor and trustee under Mr. *Clark's* will, by mortgages upon the said lots, given by *Richardson* on the 7th and 19th November, 1839; which mortgages, although they were subsequent to that given by *Richardson* to the respondents, yet give him, as the appellant contends, the right to be first satisfied, because at the time he took them he was wholly ignorant of the mortgage which had been given to the respondents, and was therefore entitled to tack these securities for his subsequent advances to the mortgages taken by *Clark and Street* on the 12th of December, 1831, which were prior to the mortgage held by the respondents.

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The respondents, on their part, deny that the appellant is entitled to priority over their mortgage, in respect to any sum whatever. He cannot, as they insist, claim priority even as regards the £600; because that debt and the mortgage given to secure it, were merged in the transactions of the 7th and 19th of November, 1839; and from November, 1839, the appellant became the creditor of *Richardson*, as upon a new transaction, which extinguished all claim under the first mortgages for the £600.

Judgment.

If this be so, and if the appellant can no longer revert to these first mortgages as existing securities, then no question can be raised as to the right to tack subsequent advances; for, looking merely at the equitable assurances, all would be postponed to the respondents' mortgage of May, 1838.

But the respondents further insist, that even if the appellant can be treated as still holding an incumbrance upon the lots in question, under the mortgages for £600, given in 1831, and so entitled to priority as regards that sum and interest, still that they can only be postponed to him in respect to that debt of £600, and that the appellant cannot be permitted to tack to the first mortgages his alleged securities for further advances. They deny, in the first place, that the doctrine of tacking can be applied in this country; as it is in England; grounding their argument principally on the particular language of our Registry Act; (a) and they maintain that at any rate the facts of this case do not

(a) 35 Geo. III., c. 5.

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1844. admit of the application of the doctrine, because it is not shewn that after the first mortgages in 1831, there were later advances made on the credit of these securities, and expressly intended at the time of the advance to be secured upon the same lands; and because it is not satisfactorily shewn that the deed made on the 9th of November, 1839, of the lands in Brantford, was any thing else than what it professes to be, namely, a conveyance in fee as upon a sale, although a bond was given some days after to reconvey the estate in case a certain sum should be paid by a day named; and because there is no evidence whatever to shew that the deed made on the 19th of November, 1839, of the land in Vienna, was any thing but an absolute bargain and sale, as it appears to be.

The deeds are all duly registered in the order in which they were made, and this case, therefore, is in no manner affected by that provision of the Registry Act, which gives priority to a subsequent deed where it is first registered.

Judgment.

The material point is to get in the first place as clear a view as we can of the true character of the transaction between the appellant and *Richardson* in November, 1839.

The appellant, when he entered upon this second transaction with *Richardson*, held his mortgages for £600, wholly unsatisfied. These, for all that appear, were the first and only incumbrances upon the property. They were two mortgages given on the same day (12th December, 1831) to secure the same debt, (£600,) which was to be paid in a year, and the interest half yearly. The one mortgage was on the two lots in Brantford and upon lot nine in the second concession of Southwold (200 acres); the other was upon the lot No. 1, in Vienna only. In the latter, *Alexander Richardson* joins *William Richardson* as grantor, having, as we may suppose, an interest in that lot; which circumstance occasioned a separate mortgage to be taken for it.

Then in 1839, the £600 and interest being wholly unpaid and the estate of *Clark* and *Street* having thus become absolute at law in both these properties, the appellant takes from *Richardson* the other conveyances which we are now

to consider. In the meantime, these lots in Brantford and the lot in Vienna had been mortgaged to the respondents for a large debt, of which transaction the appellant was in fact ignorant, though the mortgage had been given in May, 1838, and registered in July following. Whether the registration was itself notice to him, it may be found necessary to consider hereafter. At present I take the case upon the footing of the transactions of November, 1839, being entered into by the appellant in ignorance of the mortgage given to the respondents.

Then it appears that on the 7th November, 1839, he took a common deed of bargain and sale from *Richardson* of the lots in Brantford alone, as upon a purchase for £1350, the consideration being acknowledged to be paid, and of which there is the usual receipt endorsed. In this deed *Richardson* covenants that he is the true, lawful and rightful owner, that he has a good, absolute and indefeasible estate of inheritance, without any thing to charge or encumber it. There are no recitals in this deed, and nothing whatever contained in it which can enable us to say that it was not meant to be an absolute sale to the appellant of those lots in Brantford, for the price mentioned; and if it were that, and if the debt of £600, for which the appellant had held this land in mortgage, was still unpaid, we must suppose that that debt with interest was reckoned in as part of the purchase money, and that the appellant's prior interest as mortgagee was merged in his absolute ownership, *Richardson* having no longer any equity of redemption, and the appellant's security being in consequence extinguished; for a man cannot have security upon his own property. But we see that six days afterwards (13th of November, 1839) the appellant executes a bond to *Richardson*, in a penalty of £3040 6s. 10d., reciting that *Richardson* had made a deed in fee simple of these lots in Brantford to the appellant, "for the nominal consideration of £1350," and which said lots heretofore "mortgaged to the said *Samuel Street* and the late Honourable *Thomas Clarke*, are now conveyed to the said *Samuel Street*, for the better securing a debt due by the said *Richardson* to the late firm of *Clark*

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Judgment.

1844. and *Street*”—and the condition is, “that if the said *Samuel Street*, his heirs, &c., shall, upon payment of £1520 3s. 5d., and legal interest, to be computed half yearly from the 28th December (then) next, due and owing by the said *William Richardson* to the late firm of *Clark and Street*, within two years from the date of these presents, reconvey to the said *William Richardson*, his executors, &c., the said lots of land, then the obligation to be void.”

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
Six days after this, viz., on the 19th November, 1839, the appellant takes from *Richardson* another deed of bargain and sale in the common form, without recitals of any special nature, conveying to him in fee as upon a purchase, for a consideration of £500, acknowledged to be paid, (and for which a receipt in the usual form is endorsed,) the lot No. 1, in Vienna, and also the lot No 9, in Southwold, which had been mortgaged by *Richardson* to the appellant on the 12th December, 1831, by the deed to which *Alexander Richardson* was not a party. As respects this lot, there is no evidence that the appellant gave any bond or entered

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In what light then are we to look upon these transactions in November, 1839; and what effect have they had upon the first mortgages taken by the appellant in December, 1831? The appellant’s counsel, if I understood him correctly, did not consider it necessary to his case to establish that the deeds taken in 1839, were taken by way of mortgage or security only, but contended that his client was equally entitled to prevail over the mesne incumbrancer, if those transactions were really what the deeds themselves import; that is, an absolute purchase of the property in the ordinary sense.

The counsel for the respondents, on the other hand, assumed that in order to entitle the appellant to claim pri-

ority over them for any moneys advanced after they took their mortgage in 1838, it would be indispensable to the appellant's case to shew, first, that his first security taken in 1831, for £600, is still a subsisting security; and next—that his subsequent advances having been made upon the credit of the same property were secured to him by mortgage in 1839, taken in ignorance of the mortgage made to the respondents in 1838; so that the doctrine of tacking subsequent incumbrancers might be applied to it, if in this country it can be applied at all, upon which principle alone they seemed to suppose the appellant's claim could be supported.

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If it be necessary to the appellant's case that the deeds given by *Richardson* to him in 1839 should be shewn to have been given as securities only, and not upon an absolute sale, then we must consider that there is no evidence upon the point, except what the instruments themselves import. Their due execution is admitted, and beyond what we see in them we know nothing.

The respondents read no part of the appellant's answer in evidence which throws any light upon the transactions between him and *Richardson*. Whether the appellant, after he took the deeds in November, 1839, went into possession or forebore to do so, and whether the lands in Brantford and Vienna are of equal or much greater or less value than the £1350, and £500, mentioned in the deeds as the consideration for the purchase, is not proved; though these are facts that often help, in equity, to place on the footing of a mortgage only, an assurance which on the face of it professes to be a sale. Neither is it shewn whether during or since these transactions either party has made considerable improvements, or who has had the custody of the title deeds. Judgment.

With regard to the lot in Vienna, I see nothing in evidence that shews the transaction respecting it on 19th of November, 1839, to have been any thing but a sale of the lot to the appellant for £500, as the deed imports it to have been. As respects the lots in Brantford, there is the bond admitted to have been given on the 13th November, 1839,

1844. by which the appellant bound himself to reconvey those lots, if £1520 3s. 5d. should be paid by *Richardson* within two years; and this, it was contended, made it a mortgage. I should have much doubt of that.

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Where a man has absolutely conveyed an estate to another, both parties meaning and understanding it to be a sale, a bond being given some days or months afterwards to reconvey the estate in case the grantor shall, by a certain time, pay to the grantee a sum of money, will not, as I take it, convert that which was a sale into a mortgage. (a) In order to produce that effect, it must appear that the bond to reconvey was either given at the time, or at least given in pursuance of an understanding which existed when the conveyance was made. There are many cases which turn upon the fact, that the grantee has in subsequent instruments or transactions treated the first deed as having been intended to give security merely upon the land, and has acted in such a manner as to shew that he took it for that purpose and no other; as by suffering the grantor to remain in possession, to make improvements, &c., and in these cases when the transaction has been held to have been one of mortgage only, the circumstances have, as I consider, been deemed in equity to amount to proof that the parties did, at the time of giving the deed, understand and agree that the land was only to be held in security, and not upon an absolute sale. But if the case should appear to be one where the grantee having really taken the land either in discharge of a previous debt, or upon a sale, has nevertheless agreed that in case the grantor should pay him a certain sum by a day named he would reconvey to him, then I look upon the transaction as standing on a different footing. And whatever may be the effect, where the grantee makes a promise or declaration to that effect at the time of taking the deed, (b) I consider it clear, that if it is not part of the original transaction, but it is altogether a subsequent arrangement, then it is to be regarded merely as a privilege conceded by the grantee which the grantor may avail himself of, if he observes the condition, but loses if he is not

(a) *Gorey's case*, 3 Salk. 241.

(b) 5 Br. Pr. ca. 184.

punctual. He stands on the same footing as a party does upon an original agreement to sell at a certain price, provided the money shall be paid on a certain day. Now as to the lots in Brantford, the deed of the 7th November, imports an absolute sale of them; the bond given on the 13th November shews that the appellant did then agree to reconvey the land if £1520 should be paid to him in two years. It recites also that the consideration mentioned in the deed was nominal only, and that the lands had been conveyed by that deed "*for better securing the debt due to Messrs. Clark and Street.*"

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No doubt as between the appellant and *Richardson* this recital in the bond would be conclusive evidence that the lands had been taken in security only, and if *Richardson* accepted and held this bond, of which there is no evidence, that might be a reason for regarding him as acquiescing in the statement; but it does not appear to me that we could treat the bond given by the appellant six days afterwards as evidence conclusive upon third parties of the facts and intentions which it recites, viz., that the deed of the 7th November, though it professed to be a sale, was given at the time as a security only, and was so intended. This would be allowing the appellant to derive from his own recital of the past transaction evidence for himself. But the appellant and *Richardson* could not, in my opinion, by any thing recited in the instrument between themselves, bind a third party (viz., the respondents) so as to prejudice their interests retrospectively by giving to a deed made in 1839 a preference over one made in 1838, merely upon a supposed state of facts of which there is no other evidence than that one has recited them in a bond given by him, at a subsequent period to the other. If the mesne incumbrancer is to be postponed to the holder under an alleged later security, the facts which are to give such preference must be proved *aliunde*.

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It is no doubt a principle that fraud is not to be assumed or surmised; and, therefore, if in November, 1839, *Richardson* had executed a mortgage to the appellant on these lots in Brantford, we must have taken that to be a mortgage

1844. according to its purport, till it was shewn to have been a pretended transaction. (a) But here is a deed, on the face of it no security, but an absolute sale; and a bond given seven days afterwards cannot change the character of that transaction. If, therefore, it were necessary to shew us that the land had in fact been mortgaged on the 7th November, and not sold (as the deed imports) in order to lay a foundation for applying the doctrine of tacking, it seems to me we ought to have such evidence as would satisfy us that such had been the intention of the parties. I should not consider the appellant could, for that purpose, rest upon the recital contained in the bond given by himself, that the transaction of the 7th November was not what the deed expresses it to be. If the merely agreeing on the 13th November to reconvey, on a certain payment being made would make that a mortgage which before was a sale, then of course, we must henceforth look upon the conveyance as a security only. But that would not, in my opinion, be the effect.

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The appellant's recital does not, I think, supply evidence against the mesne incumbrancer that what he recites in the bond to have been the intention on the 7th November, was really intended then, and more especially as the appellant does not precisely deny any knowledge of the second mortgage at the time that he gave that bond. If the parties to the deed of the 7th November could give a different effect to the transaction to the prejudice of third parties not privy to the deed, by a writing sealed six days after the deed was given, they could do so as well by any deed given now, or if the *lis pendens* would be held to disable them from changing their ground, they could at least as well have done it by such a writing given at any time before filing the bill. But they could not, as I think, by any afterthought, or any mere assertion of a previous intention, give a new character to the deed of the 7th November, in a manner that would be binding upon a party in an opposite interest.

The appellant's answer, it is to be observed, denies

notice of the plaintiff's mortgage at the time he took the two deeds of the 7th and 9th of November, 1839. He does not expressly deny notice after he took the deed of the 7th of November, and before he gave the bond of the 13th. 1844.

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Then upon another point that was made in the case, if it were in evidence that after December, 1831, Messrs. *Clark* and *Street* had actually made advances, that is, had given further credits to *Richardson* in ignorance of his having made the second mortgage, (of 1838,) then, (provided a mortgage had been taken afterwards to cover those advances, at any time before notice,) I think that would be sufficient to enable the appellant to tack it as an additional security. I mean that it is not necessary it should appear that the further advances were made upon an express agreement, *at the time of making them, that they should be thus secured* by mortgage on this particular property. One meets with language in treatises and in adjudged cases, on this branch of the subject, which would lead us to suppose that the evidence should go that length; but the doctrine is not intended to be so laid down, as a careful examination of the cases shews. (a) It is sufficient if a party having a mortgage for a subsisting debt, and knowing of no later incumbrance, makes further advances, for he knows that he holds his debtor's land in pledge, and may, or rather must naturally be supposed to give the further credit, knowing the security which he actually holds, and trusting to it. If indeed he allows the latter debt to stand uncovered by any form of security that will attach as a lien upon the land, he cannot tack a mere outstanding debt to the prejudice of a mesne incumbrancer; nor could he tack it as against the mortgagor himself, though he may against his heir or devisee upon a particular ground. But when he takes a mortgage to secure it, (be that when it may, so long as he has not received notice of the mesne incumbrance,) he gains his right to tack. This is plainly laid down in the case *ex parte Knott*, (b) and may be found elsewhere explained; so that I take that point to be clear.

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It was not pretended or surmised in the argument that

(a) 2 Atk. 347; Story Eq. Jur. Sec. 1010.

(b) 11 Ves. 617.

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1844. both parties, appellant and respondents, did not throughout their transactions in this case act in perfect good faith ; and looking at the bond alone, and we have nothing else to look at as affecting the operation of the deed of the 7th November, the reasonable construction to be given to it, I think, is this : that the appellant, not considering the mortgage with a condition for redemption on the face of it, so eligible a security as an absolute conveyance, desired to exchange the one for the other, and at the same time to take into account any further debt which *Richardson* had afterwards contracted with Messrs. *Clark* and *Street*, and instead of holding the old mortgage for £600, to take an absolute conveyance as a purchaser.

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If this were intended to be held as a security, which I hold not to be established by the evidence, it may have been supposed that upon such a transaction *Richardson* would not retain an equity of redemption as upon a plain mortgage, and that after the day mentioned in the bond had passed, the appellant might, if he preferred it, keep the land absolutely, as upon a mere purchase, without any danger of being disturbed, and without the necessity of selling the property under the clauses of sale contained in the two mortgages of 12th December, 1831. Such a sale would generally occasion some sacrifice of value ; and if the land were worth less than the debt charged upon it, which may probably have been the case here, the creditor would in that event prefer having the option of retaining the land discharged of all equity of redemption.

But speaking only of what is in proof, I must say, that whether in November, 1839, the appellant agreed to take the land in discharge of his debt, and afterwards gratuitously and as a mere act of indulgence, bound himself to convey back the lots in Brantford if the debt for which he accepted the land should be paid in two years, or whether the original agreement in November, 1839, was that the lands were to be held in security only, is not, I think, clearly established.

I was under the impression upon the argument that the case would turn upon this question of fact. For when the

appellant took the deed of November, 1839, and gave afterwards his bond to reconvey, supposing that to have been done in pursuance of an agreement made at the time, it would have undoubtedly amounted to a mortgage, so far at least as the lots in Brantford were concerned; and then if the old mortgage given to the appellant in 1831 were to be treated as still being kept on foot, there would be two mortgages existing at the same time upon the same property and for the same debt, which would be repugnant. Further, it appeared to me, that if we were to look upon the deed of the 7th of November as a mortgage for the whole debt then due to Messrs. *Clark and Street*, it must be regarded as a new security substituted for the other, and not co-existing with it, and there would be every reason for so considering it. For on the one hand, it gives a further day of payment, and on the other hand, it gives the creditor a better security, converting, as we must infer, all the interest due upon the old mortgage into principal, with power to hold the estate discharged of all equity of redemption, if the money should not be paid at the time mentioned in the bond to reconvey.

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The argument for the respondents was, that this taking of a new, and as the appellant terms it in his bond, "better security" extinguished the debt due under the old security, and left no incumbrance remaining under the mortgage of 1831, to which any subsequent security could be tacked; and if this were so, and if the appellant's case could only be upheld upon the principle of tacking, then it would have made an end of the case, and we must then have only regarded the appellant as holding upon a mortgage which included his whole demand, and which was taken after that under which the respondents claim. But I perceive that the case lies within narrower compass; and I have adverted to the questions which were made respecting the supposed second mortgage to the appellant and the effect of it, not under the impression that our decision of the case can turn upon the point, whether the transaction in 1839 was a mortgage or a sale, but rather because I wish it to be understood that the different points argued in the case had not escaped consideration.

1844. I will return now to the case, as I think it really stands upon the evidence. We see no more than this: that in December, 1831, the appellant and his partner took the mortgages in fee on the two estates in question from *Richardson*, to secure £600, to be paid in a year with interest: that in 1838 *Richardson* made a mortgage of the same property in fee to the respondents, for their debt of £4948 16s.: that the appellant, while his mortgage of 1831 remained wholly unsatisfied, and without any notice of this second mortgage, took an absolute conveyance in fee from *Richardson* of the two estates, for sums named in the respective deeds, which conveyances appear by the deeds to have been made upon sales and not to be held in security, and which it is not shewn were in reality taken upon any other understanding. This, as regards the lot in Vienna, I take to be quite clear: as regards the lots in Brantford, I look upon the case as being left by the evidence upon the same footing, though the bond is evidence that some days after the appellant did undoubtedly agree to reconvey if Judgment. £1520 and interest should be paid by a certain time, and did admit in that bond that the deed was taken in security, which admission, though binding upon himself as between him and *Richardson*, is not, in my opinion, evidence for him, if it were necessary to establish the fact for the purpose of postponing the respondents, (a third party,) who would not otherwise be postponed, and especially as he does not precisely deny notice of the second mortgage when he gave that bond.

Now, to apply the principle of equity to this case; it is a general principle pervading the administration of equity that the court will not apply its equitable powers to the prejudice of a *bona fide* purchaser for good consideration, without notice, and from a modification of this principle is derived the doctrine and practice of tacking, which is laid down by Lord *Hardwick*, in *Morret v. Paske*, (a) in these concise and clear terms: "where there is a prior mortgagee who has a puisne incumbrance, a second mortgagee shall not redeem the prior without redeeming the puisne at the

(a) 2 Atk. 53.

same time, and the reason is, because the legal estate is in the first mortgagee, and the court will not take away that benefit from him, provided he had no notice of the second when he bought in or took the puisne one.”

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It is objected by the respondents, that if the appellant is driven to rest his case upon the English practice of tacking, he must certainly fail; for they deny that we can give effect to that doctrine in Upper Canada. The principle, they say, is harsh and unjust in itself, as regards the mesne incumbrancer, whom it postpones to the last mortgagee upon unsatisfactory and unreasonable grounds. They allege that it has been always looked upon with disfavour by the most enlightened English lawyers; and they intimate that we have in this country a kind of discretion not to introduce and countenance here a principle to which nothing could reconcile us but long and inveterate habit.

They contend also, that our Registry Act excludes the possibility of tacking; and makes it imperative on us to give effect to titles according to the order of registration.

Upon the first point, very eminent men, it is true, have expressed doubts at least of the justice of this doctrine of equity; but on the other hand, judges of great reputation have placed the doctrine in such a light as seems to shew that in their opinion it might be well vindicated, considering the grounds and purposes for which courts of equity will interfere with strictly legal rights. If it were of any consequence, (which it is not,) what we may think of this abstract question, I should be inclined to say that the refusal of a court of equity to compel an individual to surrender a legal advantage, which will protect him in holding what he has honestly paid for and innocently acquired, does not evidently deserve to be spoken of in terms so harsh as we may sometimes find applied to it. But at the same time, it does seem to me that those have most reason on their side who think that such a doctrine should not have been suffered to gain ground. It is avowedly founded on the principle, that where two parties possess equal equity, the Court of Chancery will not come in to deprive either of an advantage which he is entitled to in law, but will leave

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them to stand on their equal rights. But are the equities equal? As was noticed in the argument, the courts in America have very generally, perhaps invariably, held that that are not; they say, "*prior in tempore, potior in jure.*" They do not deny, that where the equity is equal, the law should prevail, or as the maxim is "*in æquali jure melior est conditio possidentis.*" But they hold the equity not to be equal, considering that the priority of time gives a claim to consideration which the other has not; and certainly it seems to do so. When the first mortgage has been kept on foot, its priority is not in dispute. Then as to the second mortgagee, he has this to say in his favour, that when he took his security, whether he did or did not know of the first, he knew at least of no other than that which could claim before him. And he can go further, and say that there *was no other*. He wants no favour or compassion, but asks simply for his right. The taker of the third mortgage, when he had no notice of the second, may say, as the other could, that he knew of no mortgage after the first which could come in before his later mortgage at the time he took it; but he cannot, like the second mortgagee, go further, and say that there was no other. They do not then stand exactly upon equal terms, and the difference in their cases is an important one, quite sufficient, one would think, to have turned the scale. Because, as the second mortgagee is prior in point of time, he only asks to stand where the facts should place him. We have no ground for charging him, even in imagination, with any want of vigilance or care; but how can we be satisfied that the third mortgagee has not been negligent in some slight degree? And if he has in any degree, then the equities are not in truth equal.

To say nothing of the prudence and obvious propriety of searching the register, when there is one, we cannot be certain that enquiry of another kind would not readily have brought to him intelligence of the second mortgage. It would seem but natural after several years had elapsed, to have asked the mortgagor whether he had given no second security on his land. When a person omits this, it is difficult to say that he stands on as fair ground as the person

who came before him, when there was nothing to learn, and when, as it appears, there was no one whose right could interfere with his. This consideration alone, namely, that we can never be quite sure that a due degree of caution would not have saved the taker of the third mortgage from all damage—would seem to preclude us from treating the two parties as on ground equally entitled to favour. We have no pretence for saying that one has omitted any due precaution; for he does not wish or expect to displace the security which was before his in point of time. Of the other, we cannot say that an exercise of a moderate degree of caution would not have saved him from advancing his money upon a security which can be of no use to him unless he is allowed to override a security which was before his, and which, in equity at least, was a perfect, good and adequate security at the time it was taken.

But we need not, for any purpose, dwell upon the reasonableness of the principle. The doctrine is firmly fixed in English courts of equity, and is, therefore, as firmly fixed here, unless we can ground on some legislative enactment of our own the right or obligation to discard it.

The American courts, as we may suppose, find no insuperable difficulty in relieving themselves from the mere force of English authority, when they think adjudged cases at variance with general principles. We are clearly bound by such authority, when we can shew no dispensation from it. If in a single case, a conveyancer in this province has advised the buying in of a prior incumbrance, in order to enable the taker of a third mortgage, without notice, to prevail over a mesne incumbrancer, we have no right to say that, however the case would stand upon English authorities, such a purchaser shall nevertheless lose his money, because we disapprove of the grounds on which English courts have gone. The tribunals of the United States, both legal and equitable, have in the decisions of the English courts a pattern which they *may* work by. We have in them a pattern which we *must* work by, unless where the legislature has sanctioned a deviation. Besides constitutional principles binding upon us as an English colony, our adoption of the English law and the

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1844. express enactments of our Chancery Act make it mandatory on our courts of equity to give effect to English principles of equity, where our own legislature has made no special provision.

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This brings us then to our Registry Act of 1795; for I know nothing else that can raise a question.

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Our statute (a) concerning the release of mortgages cannot, as it appears to me, in any way affect this case, and no argument has been founded upon it on either side. Then as to our Registry Act, (b) we cannot, in my opinion, hold that the English doctrine of tacking securities can be rejected here upon the ground that registration under that act is in itself notice, and that the appellant when he took his deed in 1839 must be supposed to have known of the second mortgage given in 1838, because he might have seen a memorial of it registered if he had chosen to search for it. The English decisions on that point are numerous, and the point is settled. *Bedford v. Backhouse*, (c) *Wrightson v. Hudson*, (d) Lord *Redesdale* in *Bushel v. Bushel*, (e) and *Underwood v. Lord Courtown*, (f) give strong reasons why registration ought not to be held notice to all intents. And another reason, I think, might have been added, scarcely less strong than those which he gives. In Ireland it has been held that the Registration Act of that country has the effect of preventing tacking—*Latouche v. Dun-sany*; (g) not, however, on the ground that the registration of the second mortgage is notice to the person taking the third, but entirely by force of the clause of their Registry Act, which provides “that every deed shall be effectual both in law and equity, according to the priority of time of registering the memorial.” This settles the point of priority by a clear and express enactment, and secures the preference to the second mortgage. Our Registry Act contains no such clause, and therefore Lord *Redesdale*’s decisions in that respect do not help us. But it is contended, that though our statute does not in terms enact that deeds registered shall

(a) 4 Wm. IV., chap. 16. (b) 35 Geo. III. chap. 5. (c) 2 Eq. Ca. Ab. 615.
(d) 2 Eq. Ca. Ab. 609. Pl. 7. (e) 1 Sch. & L. 103. (f) 2 Sch. & L. 64.
(g) 1 Sch. & L. 137.

take effect according to the time of registering, yet that such is evidently the intention of the statute, and such the effect which should in reason be given to it. 1844.

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I understand from his Honour the Vice-Chancellor that he decided in favour of the respondents principally on that ground, and therefore it has been necessary to consider the point carefully. For my own part, I do not see in our statute what we could satisfactorily rely on for supporting that view of the question. It contains, certainly, no clause like that in the Irish statute which has been made the foundation of the decisions there, nor any thing which seems to me equivalent to it. Our statute has been closely modelled on the English acts, (a) so far as it goes at least; for it does not provide for registering judgments. I see nothing in the enactments varying from the English acts that can affect this question. It was the preamble which in the argument of this case was mostly relied upon. That is much to the same effect, though less forcible and particular than the preamble of the English acts.

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It recites, that it seems to be a desirable measure to establish a register in each county, in order that when lands are alienated by any deed of sale, &c., or by gift, devise, or mortgage, a memorial of such transfer or alienation shall be made, for "*the better securing and more perfect knowledge of the same.*" This shews no different intent or object from that avowed, as the moving inducement to the English acts; and when the enactments are so precisely similar, I think we shall not be authorised to hold that so much more was meant to be done, and has been done, by the one act than by the other. The danger and inconvenience which they were all intended to guard against were the same, viz.: the peril to purchasers of finding their titles defeated by some prior conveyance which had been kept secret, and which they had no means of finding out. Ample security is by the act provided against this evil, by compelling all persons to register their deeds at the peril of their being considered fraudulent if they remain unregistered, as against any person taking a subsequent conveyance of the same land, and

(a) 2 & 3 Anne, chap. 4; 6 Anne, chap. 35; 7 Anne, chap. 30; 8 Geo. II. chap. 6.

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1844. putting it on record. Our preamble reaches no further, as I see, than an explanation of the expediency of this provision. I mean, it does not obviously do so. It better secures the mortgage or alienation, certainly, if by placing it on record it is made safe against any prior secret conveyance which might otherwise have defeated it, and it tends to give "*more perfect knowledge of the same*," without doubt, because all persons going to the office to search, may there gain knowledge of it.

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It may be objected, and I confess not without reason, that the object of better securing the alienation or mortgage is but imperfectly answered, if an honest mortgagee duly registering his deed is liable, as in the case before us, to be defeated, not, to be sure, by a prior unregistered deed, but by a subsequent one, which was not only not registered, but was not made when the mortgage was put upon record. But that is the effect of a wholly different cause from that which these acts were intended to guard against. If the second mortgage in such a case is postponed to the third, it is not an advantage gained by any concealment against which the Registry Acts were intended to provide. The 2nd and 3rd Anne, chap. 4, would afford room for the same argument, as it has been attempted to found on the preamble of our act, and rather more plainly, for it recites that "for want of a register, persons in trade found it difficult to give security to the satisfaction of money lenders, although the security they offer be really good." Now one would not be surprised to hear a money lender in the West Riding of the County of York, complaining that it was to little purpose that he had registered his mortgage, knowing it to be a security really good, because he saw none registered before it, except a mortgage for a small sum which could do him no injury, if he were still subject to the risk of being defeated by a mortgage taken and registered after he had registered his. And yet there is no point clearer than that on the construction given to these statutes in England—the practice of tacking when there has been no notice of a mesne incumbrance, is upheld just as it was before the Registry Acts. It is a practice resting on a supposed good ground in equity, wholly apart from these statutes, and the

mischief against which they were intended to guard. And there is this, at least, to be said in its favour, that the second mortgagee has the means of knowing from the register that there is a security on the estate prior to his, and that he must run the risk, if he advances money on a later security, of being postponed to one still later, if such person lends under such circumstances and will take such steps as will entitle him to the benefit of the rule in equity. And the second mortgagee may protect himself against any later incumbrance by giving notice to the first mortgagee. It might be convenient and just for the legislature here, (but of that we need give no opinion,) to provide as is done by the Irish act, that registered deeds shall take effect according to their order in the register; but they have not yet done so, certainly not expressly; and, I think, not by any implication so clear that we can safely and properly rest upon it, having in our view the English Register Acts, and the decisions which have been made upon them on this point.

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We are brought then, I think, to the question, what would the effect be in an English court of equity on the same state of facts as is before us in this case?

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In this country, and as common law judges, we are little familiar with such questions, and I regret that my opinion should have any weight in deciding it, for the sum at stake is large. Both parties, I have no doubt, are contending for what (so far as their conduct and intentions are concerned) they have a fair claim to; and after all I have heard and met with on the subject, I cannot say that the opinion that I have formed upon it is such as wholly satisfies me.

For the appellant, this is the argument. A court of equity will do nothing to hurt a *bona fide* purchaser for value without notice; and an incumbrancer under the same circumstances comes under the same rule, both technically and in reason. The effect of this principle, in giving rise to the doctrine of tacking, has been considered; it is not a modern doctrine, nor one that has grown gradually till it has attained a height not contemplated at first; for in the early case of *Baxter v. Manning*, in 35 Car. II, (a) it was car-

(a) 1 Vern. 244.

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ried farther than it ever is at this day. Then it is said here, that if you look upon the deeds given in November, 1839, as securities only to cover the sum of £1520, the appellant is entitled to have his money before the respondents can be satisfied from the estate, because he holds the legal title under the mortgages of 1831; that the law, therefore, enables him to hold the estate; that he may honestly do so till all his money is paid, because he advanced it all in ignorance of any other incumbrance; and that equity, therefore, will not disturb him. If, on the other hand, we should think that we can only look upon the appellant as holding an absolute conveyance of the equity of redemption under the deed of 1839, still the same principle, it is contended, affords to the appellant the same protection, for that he holds the legal estate in form under the first conveyance, and in substance under the purchase made afterwards in ignorance of the second mortgage for a good consideration, acknowledged and not impeached, and that equity under such circumstances will no more interfere to make him lose his purchase money than it would to make him lose his money lent upon the land. I believe no one of us questions the principle of which the appellant would avail himself: the doubt is upon the reasonable application of it.

The respondents maintain, that in 1839 the appellant abandoned his first security, and deliberately postponed himself to the mortgage of 1838, by taking a conveyance of the fee, as of an unincumbered estate, from *Richardson*.

If we take the case as the appellant states it, he says the deeds taken in 1839 were securities to cover the whole debt due to Messrs. *Clark* and *Street*, and there remained after that no incumbrance or lien for the debt of £600, under the first mortgage, to which this alleged subsequent mortgage could be tacked. That if the appellant took a fee under the deeds of 1839 as the absolute purchaser of the equity of redemption, he could only take it as *Richardson* himself held it, namely, subject to the mortgage given in 1838, which he must discharge before he can enjoy any thing under a conveyance of the equity of redemption. I took at

first that view of the case. Though reason may seem to be with the respondents, an examination of the many cases upon the subject has brought me to the conclusion, that in England the appellant in such a case as this must undoubtedly prevail, simply on the ground that the legal estate is in him, and ever has been since the making of the deeds in 1831, and that the equity as between him and the respondents being equal, equity will not interfere to deprive him of his purchase money honestly paid without notice of any prior incumbrance. This principle is laid down under all its modifications, and its grounds and consequences explained with great method and clearness in Lord *Hardwicke's* judgment in *Willoughby v. Willoughby*. (a) The older authorities on which it rested seem to be sustained to their full extent, (b) except perhaps as to one point, which cannot be in question here, and to which, therefore, I do not advert. I refer especially to the case of *Churchill v. Grover*, (c) which seems not to be distinguishable from the present case in substance and effect; to *Blackstone v. Moreland*; (d) *Hasket v. Strong*; (e) *Turner v. Richmond*; (f) *Hitchcock v. Sedgwick*; (g) *Edmunds v. Povey*; (h) *Holt v. Mill*. (i)

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Upon the doctrine held in all these cases, and in many more modern which confirm them, it appears to make no difference whether the party claiming priority on the ground that he has the law on his side as well as equal equity, be a purchaser of the legal estate or only of an equitable interest. (j) He cannot be less entitled to be suffered to remain undisturbed as the *bona fide* purchaser of the fee without notice, than he would be if as a mortgagee he had taken a mere equitable interest without notice; for such mortgagee is but a purchaser *pro tanto*.

Whether he stands in the one situation or the other, the maxim is, that being a *bona fide* purchaser for good consideration, and without notice, the court will take no advantage from him, "*he shall be left all advantages to defend himself by.*"

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|-------------------|---------------------------------|-------------------|
| (a) 1 T. R. 763. | (b) Powell on Mort. 2 vol. 510. | (c) 1 Ch. Ca. 36. |
| (d) 2 Ch. Ca. 20. | (e) 2 Stra. 689. | (f) 2 Vern. 81. |
| (g) 2 Vern. 156. | (h) 1 Vern. 187. | (i) 2 Vern. 279. |
| | (j) Ca. Tem. Tal. 67. | |

1844. I find it in some places stated, that where a mortgagee has acquired the equity of redemption, the effect is that his interest ceases to be considered as that of a mortgagee, unless by some clear act he evinces his intention to keep up the charge; but in *Forbes v. Moffatt*, (a) this point was very much discussed, and the latter part of the judgment, in which a case of Lord *Compton v. Oxenden* is cited, is applicable here. (b) The principle settled by this judgment is, that where one having a charge acquires the legal estate, his charge sinks or not, according as it appears to be for his interest or otherwise that it should subsist. If he manifests an intention that it should sink, it does sink; if not, and he is indifferent, then also it sinks; if no intention is shewn, and it may be in his favour to prevent a prior mortgagee from coming in, it will not be treated as being sunk.

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I think the evidence before us shews nothing more than that in 1839 *Street* acquired the equity of redemption, agreeing afterwards that he would reconvey part of the property, if his purchase money were repaid to him. He was then ignorant of the second mortgage. If he had been made aware of it, or had been advised that he ought to take care and not subject himself to be cut out by a mesne incumbrancer, he would assuredly not have desired or agreed to lose the advantage which he had as the holder of the prior charge; and therefore, on the authority of *Forbes v. Moffatt*, we must not impute to him such an intention. He could not have imagined that by taking a conveyance of the equity of redemption while all his debt was unpaid, he would be in a worse situation than when he held the defeasible estate; but following the authority of *Hasket v. Strong*, *Churchill v. Grover*, and *Turner v. Richmond*, we must hold, what indeed is clear and incontrovertible, that the appellant continued seised from December, 1831, of the legal estate; that the respondents have nothing but an equitable mortgage granted by *Richardson*, when he had no legal estate in the land; that the appellant taking from him in 1839 an absolute conveyance of the fee, was then no

(a) 18 Ves. 384.

(b) See *Emmons v. Crooks*, ante. p. 167.

more seised of the legal estate than he had always been since 1831. 1844.

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The only consequence was, that *Richardson* had henceforth no interest to set up. He was as much divested of the legal estate indeed before he made that deed as afterwards. The respondents never had it. It must always have been somewhere, and was and is clearly in the appellant, and in no one else.

This entitled him in an English court of equity to say, "I have the clear legal estate, and you shall not be allowed to disturb me, on the ground of any equity which is not greater than mine."

Nothing seems clearer than that a third incumbrancer buying in a satisfied term, will be allowed to protect himself under it. And this is a case coming under the same rule, for the appellant is no otherwise satisfied for his first mortgage then as he may be allowed to hold the lands which he took in discharge of it. In *Turner v. Richmond*, there was a "first mortgage which was paid off, but no re-conveyance, and next a judgment creditor; then there followed a second mortgagee, whose bill was against the first mortgagee, the mortgagor and judgment creditor to have a re-conveyance from the first mortgagee, he being satisfied, which he acknowledged by answer, and pending the suit did afterwards assign the mortgage to the judgment creditor, which the Lord Chancellor did declare to be justifiable, both in him and the judgment creditor, and unless the plaintiff would redeem and pay off the debt by judgment, dismissed the bill."

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When such a decision is upheld, it is impossible to decree in favour of these respondents, for in truth all the appellant's debt of £600 has never been actually satisfied, and all that can be said is, that having no notice of any subsequent mortgage, he either sought to strengthen his security by taking absolute deeds, and thus freeing himself from the equity of redemption, but contracting to reconvey when his debt was paid; or he agreed to take the land absolutely in discharge, and became simply a purchaser. In either case

1844. he has a much stronger and clearer right to hold on by his legal title than could be set up in the case just cited, by a person buying up an old satisfied term, after he had notice of the second incumbrance.

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I did at first think that the class of cases to which I shall presently refer, would lead us to let in the respondents as entitled to be first satisfied, on the ground that the first incumbrance was merged in the subsequent transaction, and that the appellant could not revert to it as a subsisting charge. But on an examination, they will be found to turn upon the fact of notice of the mesne charge, either actual notice or constructive notice, or upon the express undertaking of the last incumbrancer to discharge the intermediate mortgage. I allude now to *Mocatta v. Murgatroyd*, (a) *Brown v. Stead*, (b) to the cases reported in 1 *Simons* and *Stuart*, 369; 4 *Simons*, 351; 3 *Merivale*, 210; respecting which I am now satisfied that they would not sustain a decision in this case in favour of the mesne incumbrancer. In regard to the £600 and interest, the more one considers it, the more obvious it is that there is no injustice in any point of view in allowing the appellant to rank first as regards that part of his claim, and as to the moneys subsequently advanced; whether it is looked upon as part of the purchase money on an agreement to take the land which had been mortgaged absolutely for his debt, or as meant to be an additional charge which *Richardson* might redeem, the appellant would in either case come within the principle as now upheld in England.

This being so, the case must be so decided here, for we can apply no other rule. The sixth clause of the Chancery Act (c) is express: "That the rules of decision in the Court of Chancery thereby constituted and established, shall be the same as govern the Court of Chancery in England." And so also we should have to hold at law if a question should be raised upon the point of tacking securities, as it might be on an application to stay proceedings in an action of ejectment on a mortgage, under the statute 7 Geo. II.

(a) 1 P. W. 393. (b) 5 Sim. 535. (c) 7 W. IV, chap. 2.

chap. 20. The case of *Archer v. Snatt*, (a) is a case of that kind. 1844.

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If there should seem in the principle any thing contrary to justice, the legislature must alter the rule; we cannot. But in this case, as far as the debt of £600 and interest is concerned, the claim of the appellant is perfectly consistent with right and justice. For the remainder of the moneys advanced by him, whether viewed as an additional charge, or as part of the purchase money of the estate, he stands on the rule of equity alone, that having the vantage ground as holding the legal estate, he shall not be hurt in equity.

The whole principle is involved in what was said by Lord *Kenyon*, in a case in the King's Bench, where a party was moving to stay proceedings in ejectment, under the 7th Geo. II. (b) The mortgagee there objected to the proceedings being stayed, on the ground (which he shewed) that the mortgagor had agreed under his seal to convey the premises to him absolutely, deducting the money due from the purchase money to be paid him, but that he had since refused to complete his agreement. Lord *Kenyon* would not allow the proceedings to be stayed, on these facts appearing, saying, that the mortgagor had no right to redeem, and that a court of equity would compel him to fulfil his agreement. "If we were to listen to this application," his lordship said, "and strip the mortgagee of his legal title, it might let in a posterior equitable right, to the prejudice of the mortgagee, though he should hereafter obtain a decree for the performance of his agreement."

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But what the mortgagor in that case had only contracted to do, the mortgagor in this case has done. The mortgagee here actually has that release of the equity of redemption, which the mortgagee in the case cited had only a promise of, and surely he ought not to be in a worse situation.

What the respondents desire in this case—namely, to be let in as mesne incumbrancers between the first mortgage and the acquisition of the equity of redemption, to the prejudice of the first mortgagee—is precisely that of which Lord *Kenyon* would not suffer the risk to be incurred; and

(a) 2 Stra. 1107. (b) *Goodtitle v. Pope*, 7 T. R. 185.

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what is said by his lordship involves the clear admission, that if the mortgagee in that case, while holding the legal estate under the first mortgage, had acquired the equity of redemption in ignorance of any mesne incumbrance, he would not be disturbed by any interference of a court of equity in favour of the second incumbrancer, which is exactly this case.

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The cases of *Hasket v. Strong*, and *Churchill v. Grover*, are plainly to the same effect, and compel us to admit that in England the appellant in such a case as this, would not be postponed as to any part of his money, whether we are to look upon him as a purchaser in 1839, in the common sense of the term, or as a mortgagee merely, who is a purchaser *pro tanto*. The principle applies equally in either case. If he is the holder of a security merely for his debt, he is entitled to hold on by his legal estate, which has been in him since 1831, and absolute since 1839, till all his claim upon the estate is discharged. If we are to regard him as taking in 1839 a release of the equity of redemption, equity will not throw upon him the loss of his purchase money, to serve the purpose of a mesne incumbrancer under an equitable assurance, who comes in without his knowledge between his first acquisition of the legal estate and his purchase of the equity of redemption.

In *Collett v. DeGols* and *Ward*, (a) Lord Talbot lays down the principle in the most comprehensive terms: "That courts of equity will take no advantage from one holding the legal title." "Here," his lordship says, "the legal estate is in *Ward*, and the question is, whether in a court of equity, it shall be taken away without *Ward being paid all the money he advanced*." It was objected in that case, that the statute of bankruptcy prevented the application of the principle; but his lordship answers that by saying, "Where an act is to be carried into execution here (that is, in equity) there are certain rules to be observed, which will bind equally in the case of an act of parliament, as of the common law. One of these rules is, that a purchaser for a valuable consideration without notice, having

as good title to equity as any other person, this court will never take any advantage from him. Suppose two purchasers without notice, and the second by chance gets hold of an old term, he shall defend himself thereby against the first, who still is as much a purchaser for a valuable consideration as himself." A man getting hold of an old term by chance, as his lordship expresses it, can surely stand in no more favourable light than one who, as in the case before us, has acquired the legal title by a direct conveyance from the mortgagor to himself, made upon a good consideration, and without notice of the second mortgage. The principle in courts of equity has been carried a step farther. I refer to those cases in which it has been held, that when the person taking the last assurance did not actually hold the legal title under the first, he shall still be preferred to a mesne incumbrancer, if he has but a better right to call for the legal title. Thus in *Wilker v. Bodington*, (a) the Lord Chancellor says, "I take it to be the rule in equity, that where a man is a purchaser without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other." This goes beyond the case which we have to determine, carrying the protection farther in favour of a *bona fide* purchaser, than we have occasion to do.

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We have no authority to administer equity on different principles here, and therefore we are of opinion that the decree of the court below must be reversed.

NOTE.—The order drawn up in this case declared, that the appellant was entitled to priority over the respondents for the amount stated in the bond in the pleadings mentioned—of the 13th November, 1839—with interest; and which was intended to be secured by the several indentures in the pleadings mentioned, bearing date respectively the 12th December, 1831, and 7th November, 1839, in respect of the lands therein mentioned, as the first mortgagee thereof. And so much of the decree of the court below as was inconsistent with such order, was thereby varied and reversed. And it was referred to the court below to make such order and decree as should be consistent with the said order and the adjudication of this court, and that either party might apply for such order, &c.

(a) 2 Vern. 599.

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BALDWIN V. CRAWFORD.

Practice—Trustees.

By a marriage settlement certain property was conveyed to trustees for the benefit of the husband and wife during their lives, the remainder to their issue, (infants.) After managing the trust estate for several years, the trustees filed a bill to be relieved of the trust, and a decree to this effect was made, which, however, contained other directions; and under these and some subsequent orders, the expenditure of a part of the corpus of the estate, in improving the trust property and furnishing the dwelling house of the parents, and some other variations of the trusts, were authorised.—One solicitor acted for all the *cestuis que trust*.

On the cause coming on for further directions, the court refused to carry out the decree and orders which had been so obtained.

Mr. *R. Cooper* appeared for the *cestuis que trust*.

The facts of the case are fully set forth in the judgment of

Judgment. THE CHANCELLOR.—In this case a post-nuptial settlement was made of real and personal property upon Mrs. *Crawford* for her benefit, for her separate use, with remainder to Dr. *Crawford* for his benefit, for an interest uncertain in point of amount, with remainder to their children or the issue of such children, and on their failure to form part of the general estate. The trust-estate was carefully and properly administered for many years by the trustees, through their agent Mr. *Wilson*. The present bill was filed by the trustees to be relieved from the trust, and to pass their accounts. These are the only ostensible objects of the suit. It would seem, however, that Dr. and Mrs. *Crawford* wished part of the principal of the trust-money to be applied to the payment of certain debts, incurred by Dr. *Crawford* for repairs to part of the trust estate, consisting of a dwelling house, in which he intended to reside with his family, and for providing furniture for their use, and that the trustees would not consent to this application of trust-money without the sanction of the court. A decree was made referring it to the master to report the tenor of the trust-deed, to take an account of the trust-estate, to approve of new trustees in place of the plaintiffs, and to settle an assignment of the trust-estate to them; and to consider of any alteration that might be expedient to make in the trusts or any new trusts that it might be desirable to declare of the trust-estate. The cause was re-heard on the 14th August, 1849, when it was referred to the master to appoint one or more trustee or

trustees in room of the plaintiffs, and to allow him or them a proper remuneration for their trouble in the care of the trust-estate. The master made his report, dated the same day, in pursuance of the original decree, in which he stated that the trust-estate was to the effect stated in the pleadings; that he had taken an account of the trust-estate, which he sets forth; that he had approved of no new trustees, inasmuch as no proposal had been made for that purpose; expresses no opinion as to the application of a sum of £467 16s. 6d., part of the capital of the trust-estate, as had been proposed, to the payment of certain debts incurred for repairs and furniture of the dwelling house before mentioned, as not being within the meaning of the decree; reports that it would be expedient to vary the trusts of the settlement by introducing a power to vary securities; and to appoint one trustee, and allow him a remuneration for his services. A petition was presented by the plaintiffs for consequential directions on this report, and by the order made on hearing that petition, it was referred to the master to consider whether any part, and how much of the capital of the trust-estate should be applied to the payment of the debts incurred for repairs and furniture for the dwelling house before mentioned, and how such moneys should be secured; to tax the costs of all parties, as between solicitor and client, which were to be deducted from the fund in court; and it was directed that the residue should be paid to the new trustee, to whom the trust-estate was likewise to be transferred, the master settling the assignment and inserting in it such new trusts as he should deem expedient and had recommended, whereupon the plaintiffs were to be discharged from the trusts; all parties were to be at liberty to apply, and further directions were reserved. In pursuance of this order the master made his report, dated the 21st November, 1849, in which he appoints Mr. *Phipps* sole trustee, in room of the plaintiffs, and allows him five per cent. on all income received; reports that £425, part of the before mentioned sum of £467 16s. 9d., should be applied to the debts and repairs before mentioned and should be secured, so far as it had been

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1850. applied to the purchase of the furniture in question, by a mortgage of it; states that he had taxed the costs of all parties, and had settled the assignment of the trust-estate, containing the additional trusts which he had recommended; and which in fact comprised nothing more than a power to vary securities. Upon this report the cause is set down to be heard for further directions. What has been actually done is to take an account of the trust-estate under the original decree; to appoint a new trustee with an allowance, under the decree on the re-hearing; and to tax the costs of all parties as between solicitor and client, part of which have been actually deducted; and to settle the assignment containing the additional trusts under the order on consequential directions. This assignment appears to have been executed, and the moneys in hand paid over to the new trustee.

Judgment. The cause has now been set down for hearing, upon further directions upon the master's last report. The learned counsel who opened the case informed us that he appeared for Mr. and Mrs. *Crawford*, and also for their infant children, (who are now, and have been throughout this suit, represented by the same solicitor,) and that the other parties had declined to attend, having no further interest in the litigation, as they supposed. The master's report was confirmed on the 24th of November last, upon the petition of the defendants, assented to by the solicitor of the plaintiffs; and the learned counsel for the defendants seemed to consider the application here as matter of course rather than as the proper subject of discussion. But on perusal of the pleadings and papers, and of the different orders made from time to time, we are clear that we cannot now properly make the decree which has been asked. We do not mean in the absence of parties, and before discussion, to pronounce any decided opinion, but as at present advised, the suit appears to us to have been instituted without necessity. All that can be effected properly might have been effected, as it seems to us, without suit. True, *the bill states* that the indenture contained no clause for the appointment of new trustees. We cannot conjecture why such a statement

should have been introduced into the bill. The deed contains ample provisions upon the subject. 1850.

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Then the bill furnishes no reason why the trustees had become desirous of being discharged from the trust. Is it to be understood, that trustees who have accepted and acted in a trust, are to be at liberty at any moment to file a bill for the appointment of new trustees, (although the deed contains sufficient power for that purpose,) and to charge the trust estate with the costs? Would such a decree be proper upon a bill filed vexatiously, or from mere caprice, or without any reason? (a)

Then, had the suit been instituted for the appointment of new trustees, surely it would have been simple, and in all probability inexpensive. But occasion has been taken to ask the court to vary the trusts of the settlement, and also to expend a very large portion of the corpus of the trust fund in payment of debts. In this relief, the trustees about to be discharged had no interest: they probably took no part. But the infants were materially interested in resisting any such decree; and yet this cause has not only been re-heard, but brought on repeatedly on further directions, for the purpose of obtaining a decree highly prejudicial to them, without having their interests represented either by different solicitors or different counsel. In this way, questions, instead of having been duly discussed and considered, have been allowed to proceed as matters of course, the same solicitor representing the adverse parties, and the same counsel instructed. Costs have already been incurred, startling in amount, when we consider the value of the estate, and the necessities of those beneficially interested; and the result has been, that the court is now asked to proceed upon a report of the master, confirmed in the manner I have stated; which report materially varies the trusts of the marriage settlement, and authorises the expenditure of a considerable portion of the corpus of the trust fund in payment of debts of the tenants for life. Has this court any such power? Can a deed, into which trusts have been

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(a) Howard v. Rhodes, 1 Keen, 581, and cases collected in 3 Danl. C. P. 45 *et. seq.*

1850. introduced not found in the original contract, be permitted to stand? Can costs so incurred be paid from the trust funds? *

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How all these matters are to be set right, and whether a rehearing at the instance and on behalf of the infant defendants may not be necessary for that purpose, is a matter of grave deliberation. We have thought it right to state so much to shew the necessity of having the interest of the infants brought before us distinctly, and in order that the different parties who did not think it necessary to appear at the hearing on further directions, may attend and afford the court that assistance which it has a right to expect, in the decision of questions of such importance to the parties concerned.

HOULDING V. POOLE.

Pleading—Parties—Trustees—Married Women.

Feb. 12.

In a suit by trustees to reduce into possession the trust estate, and in which the existence of the trust estate is called in question by the defendant, the *cestuis que trust* are necessary parties.

In suits by a married woman respecting her separate property, she must sue separately from her husband, (by her next friend,) and must make her husband a defendant, as otherwise the proceeding is looked upon as exclusively the suit of the husband, and would not be conclusive on the wife or those claiming under her.

The suit was to set aside a subsequent deed which the defendant *Poole* had obtained from the grantor, by whom the deed under which the plaintiffs claimed had been executed. One of the defences set up, was that the plaintiffs' deed was fraudulent and void. A preliminary objection was also taken for want of parties.

The cause came on for hearing upon the pleadings and evidence.

Mr. *Gwynne* and Mr. *Hector* for the plaintiffs.

Mr. *Mowat* and Mr. *Crickmore* for the defendant.

THE CHANCELLOR.—The deed of settlement upon which this suit has been instituted, is peculiarly framed. *William Poole*, being seised in fee simple of the premises in question in the cause, by deed of bargain and sale, between himself of the first part, *Mary Poole* of the second part,

* See *Porter v. Watts*, 16 Jur. 757.

Thomas Houlding and *Betsey*, his wife, of the third part, and *Richard Brooks* and the same *Thomas Houlding*, as trustees for *Ann Meade*, of the fourth part, conveys the aforesaid property, for a nominal consideration, to the parties of the second, third and fourth parts in fee, in trust for the grantor, and *Mary Poole*, during their joint lives, and for the life of the survivor; and then, as to one moiety in trust for *Betsey Houlding* in fee, and as to the other moiety to the use of *Brooks* and *Houlding*, in trust for the separate use of *Ann Meade*, and then for her heirs.

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Upon the hearing, it was objected that the suit was improperly constituted, the husband of *Ann Meade* not having been made a party.

In answer to the objection, it was urged that it ought not to prevail, because—first, having reference to the subject matter of the suit, (the reduction of the trust estate into possession,) the trustees alone might have instituted it, and therefore *Ann Meade* being an unnecessary party, the suit could not be defective on account of the absence of her husband. It was urged, secondly, that these trustees must be regarded as representing the trust estate as completely as executors who might sustain an analagous suit regarding personalty; and it was urged that no general rule exists requiring husband and wife to join in suits relating to her property.

Judgment.

In support of the first objection, *Franco v. Franco* (a) was cited. But we are clearly of opinion that this case is not governed by *Franco v. Franco*. We think that where the very existence of the trust fund is called in question, (which is the case here,) it would be neither reasonable nor consistent with settled practice, to allow trustees to institute a suit like the present without making the *cestuis que trust* parties. The language of Lord *Redesdale*, (b) indeed, in the passage to which we were referred, lends some countenance to the argument of the plaintiffs. It is there said, “Trustees of real estate for payment of debts or legacies, may sustain a suit either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom

(a) 3 Ves. 75.

(b) Mitf. 174, 4 ed.

1850. *Houlding v. Poole.* they are trustees, which in many cases would be almost impossible; and the rights of creditors or legatees will be bound by the decision of the court against the trustees." The rule thus laid down has been adopted by Mr. *Calvert*, and other text writers. But it is observable that the proposition is not stated as applicable to trustees generally, but rather as an exception to the general rule in relation to them. And even with that restriction, it does not contain an accurate statement of the practice of the court. The passage we have quoted was cited in *Harrison v. Stewardson*, (a) and Sir *James Wigram* said in reference to it: "It is impossible to say that the practice of the court is in conformity with the passage which has been cited from Lord *Redesdale's* treatise; for almost the universal practice is to make legatees parties when legacies are charged on real estate."

Judgment. We think that there is no foundation for the argument, that trustees of this kind represent the trust estate in the same way as executors and administrators confessedly do. To place them in that position was the object of the 30th order of August, 1841, but even that order is not general, but is confined to cases where the trustees are in by devise, and in addition to the absolute power of disposition, are enabled to give a valid discharge for the purchase money. And since that rule, the old practice of bringing before the court all parties interested in the estate has been observed in cases not falling strictly within its provisions. (b) *Ann Meade* then being a necessary party, it is of course necessary that her husband must be a party also. That rule arising out of the doctrine of the law in relation to marriage, and the character and condition resulting therefrom, is, we think, as prevalent in this court as at common law. (c) It is true that equity regards a married woman having separate property, as a *femme sole* for some purposes. And from this doctrine it necessarily follows that, in suits relating to such property, a married woman not only may, but must, sue, not without, but separately from her husband.

(a) 2 Hare, 530. (b) *Turner v. Hind*, 12 Sim. 414. (c) Cases collected in Danl. Chan. Prac. vol. 1, pp. 111 *et seq.*; *McKenna v. Everett*, 1 Beav. 134.

When a married woman sues under the protection of her husband, the proceeding is regarded as exclusively his, and would not be conclusive against her, or those claiming under her. Therefore, in justice to the married woman—in order that her rights may not be improperly compromised by the husband—and in justice to those engaged in litigation, that the determination may be final, suits of that character should be instituted by the wife separately from the husband, under the protection of a next friend. (a) But in such cases the husband should be made defendant. Here, however, it does not appear that the husband has no interest. On the other hand, consistently with the evidence, he may have a substantial interest. (b) For this reason, as well as for conformity, we think he must be made a party to this record, and process must be prayed against him when he comes within the jurisdiction, if, as has been suggested, he is now absent. For this purpose, the case must stand over, and the plaintiffs are to have liberty to exhibit an interrogatory to prove the absence, if they desire it.

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Houlding
v.
Poole.

Judgment

COOK V. WALSH.

Practice—Re-hearing.

A party is entitled to have a cause re-heard before this court, which has already been heard and re-heard by the Vice-Chancellor alone. March 1.
Only one re-hearing before this court will be permitted, as of course.

This cause was originally heard before his honour Mr. Vice-Chancellor Jameson, who then dismissed the plaintiff's bill with costs. The cause was afterwards re-heard by the same judge, on the petition of the plaintiff; and his honour affirmed his original decree, with costs. The re-hearing took place before the late change in the constitution of the court, but judgment was not given till afterwards. The plaintiff then petitioned the Chancellor for a second re-hearing; but, before any order on the petition was made, the defendants applied to the registrar to enrol the decrees.

(a) Wake v. Parker, 2 Keen, 59; Owden v. Campbell, 8 Sim. 551; England v. Downs, 1 Beav. 96; Davis v. Prout, 7 Beav. 288.

(b) Morgan v. Morgan, 5 Mad. 408.

1850. Whereupon the court directed the whole matter to be spoken to by counsel for both parties.

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Mr. *Mowat* for the plaintiff, as to the right of the re-hearing now asked for, after two hearings before the Vice-Chancellor, cited *Omeron v. Hardman*, (a) *Brown v. Higgs*, *Blackburn v. Jepson*, *Deerhurst v. Duke of St. Alban's*, *Mousley v. Carr*, *Byfield v. Provis*.

As to the enrolment, the mere presenting of the petition to re-hear is, by the 165th order of this court, expressly made a stay of the enrolment, though in England it has not that effect.

Mr. *Morphy*, for the defendants, commented on the cases cited as to the re-hearing, and referred to the English practice in reference to the right to enrol there, notwithstanding the presenting of a petition to re-hear.

Judgment. THE CHANCELLOR.—We think that the presentation of the petition of re-hearing in this cause was sufficient to prevent the enrolment of the decree. In England, until *Byfield* and *Provis*, (b) it seems to have been the practice to permit a petition for a second re-hearing to be filed, upon the signature of counsel merely. Then, upon the case being heard upon such petition, the opposing party was allowed to argue against the re-hearing, in the way of preliminary objection. Although Lord *Cottenham* heard the cause I have just mentioned, he then propounded a new rule of practice, that, for the future, a petition for a second re-hearing should not be received except by leave of the court previously granted, upon a special application for that purpose. That practice was only established in 1838, subsequent to our Chancery Act, and has not been made a rule of this court. We are of opinion, therefore, that this petition of re-hearing was regular. Then, under the 165th order of this court, the practice as to enrolment of decrees has been settled. Enrolment is not permitted until after the expiration of 30 days from the final decree, and then only in case no petition of re-hearing has been presented. Here a regular petition of re-hearing had been presented, and its effect was to prevent the enrolment.

(a) 5 Ves. 722.

(b) 3 M. & C. 347.

Under the circumstances of this case, having reference to the re-construction of the court, we all consider the re-hearing reasonable, without entering into the merits. But we are of opinion, that the rule propounded by Lord *Cottenham* is highly expedient, and that in future no cause should be brought on for a second re-hearing unless leave shall have been previously given, upon a special application for that purpose.

JAMESON, V. C., concurred.

ESTEN, V. C.—This case was heard and re-heard by Mr. Vice-Chancellor *Jameson*. A second petition of re-hearing was presented to the present court, and before it was answered, an application was made by the opposite party for an enrolment of the decree. The attention of the court having been called to the fact that this was a second petition of re-hearing, the proper course to be pursued under such circumstances was under consideration when the application for the enrolment was made. Finally, it was determined that both parties should speak to the matter, which was done accordingly; one contending that the enrolment should proceed, the other, that the petition of re-hearing was regular, and prevented it. The registrar had been directed to stay the enrolment, on the understanding that, if it should be deemed that it was under the circumstances proper, the party applying for it should stand in the same situation as if it had not been stayed. I have looked at a great many cases on the subject, and I think it is not difficult to deduce from them a correct conclusion as to what the practice was and is in England in this respect. It is clear that one re-hearing is allowed as a matter of course, upon a certificate of two counsel that it is proper. When a re-hearing has taken place before one of the Vice-Chancellors, or the Master of the Rolls, it is also of course to obtain one re-hearing before the Lord Chancellor, for *this* reason, that in order to enable the parties to appeal to the House of Lords, he must sign the decree; which he will not do without hearing the cause. But where the cause has been once re-heard by the Lord Chancellor, there can be no second re-hearing, unless there are some special cir-

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1850. *Cumstances in the case to warrant it. The present practice is to present a petition setting forth the special grounds on which the second re-hearing is prayed, and praying permission to present a petition of re-hearing; and if a second petition of re-hearing be presented without leave having been first obtained upon a petition presented for that purpose, it will be irregular, and ordered to be removed from the files.—Moss v. Baddock. (a) This rule I consider to have been introduced by the case of Byfield v. Provis, (b) which was decided in 1838. Previously to that time, the practice had been to present the ordinary petition of re-hearing; and if the cause had been already once re-heard before the Lord Chancellor, there were three ways in which the petition might be dealt with. One was for the court, when its attention was drawn to the fact of its being a second petition of re-hearing, to direct an attendance upon it; in which case, when the parties attended, the court heard the reasons, which the party seeking the second re-hearing wished to urge in favour of it. This was done in the case of Fox v. Mackreth. (c) Another course, open to the party objecting to the second re-hearing, was to move the court to remove the petition from the paper; and a third was to reserve the objection until the petition of re-hearing came on to be heard, and then to make it in the first instance. In the last case, which was the course most frequently adopted, the court either dismissed the petition or re-heard the cause, as it thought just. It cannot, I think, be doubted, that if an application had been made to remove the petition from the paper (of which no instance can be produced) the court would have pursued the same course, and would not have granted the application, if it had thought a second re-hearing proper. It is impossible to say, therefore, that under the practice which prevailed in England before the year 1838, it was irregular to present a common petition of re-hearing, where the cause had been already re-heard. In one case, and only one, namely, that of Attorney-General v. Ward, (d) the petition stated the*

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(a) 1 Ph. 118. (b) 3 M. & C. 437. (c) 2 Cox, 158. (d) 1 M. & C. 449.

special circumstances on which the second re-hearing was sought. In the case of *Fournier v. Paine*, (a) where the ordinary petition had been presented, and the objection was made as a preliminary one, Lord *Brougham* adjourned the hearing, in order that he might ascertain from Lord *Lyndhurst*, who had already re-heard the cause, whether it was a proper cause for a second re-hearing, and afterwards actually re-heard the cause a second time upon that petition. The new rule was not established by general order, but was promulgated in the judgment of the court in the case of *Byfield v. Provis*. Had a general order been issued, introducing this practice, in 1838, it would not have been binding here unless it had been adopted; and a rule promulgated in a judgment, not expressing what the law was and always had been, but avowedly introducing a new practice, cannot have more force than a general order of court. The court here has made orders relative to re-hearings, but has not introduced the rule which at present exists in England with respect to second re-hearings. I consider therefore that the old practice prevails here in this matter, and under that practice it is impossible to consider the present petition as irregular. It is then contended that, to prevent enrolment, it is not sufficient to present a petition of re-hearing, but that service of the order is necessary; and this appears to be a correct view of the practice which prevails in England in this respect. There they have separate offices for the transaction of the business of the court. Here the proceedings towards enrolment, and the proceedings towards a re-hearing, all take place in the same office; and a party applying to enrol a decree, if a petition of re-hearing has been presented, is immediately informed of the fact. Influenced, perhaps, by this consideration, this court has by its general order made the mere presentment of the petition of re-hearing a bar to an enrolment of the decree. The order, I think, admits of no other construction, and it does not appear to be an unreasonable one. Enrolment cannot take place for thirty days after the entry of the decree. At the expiration of that time, however, it may be effected at the requisition of any party, provided no petition of re-

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1850. hearing has been presented. I think, therefore, that the petition in the present case was not irregular, and that it had the effect of staying the enrolment of the decree until it was answered. Independently, however, of this view of the practice, and supposing service of the order to be requisite here to prevent enrolment, the court would not, I apprehend, permit an enrolment of the decree to take place while it had under its consideration the proper course to be pursued upon a petition of re-hearing presented before the application for the enrolment, and, by withholding its order, was preventing the party seeking the re-hearing from effecting that service, by which the enrolment would be prevented. In *Fox v. Mackreth*, for instance, while the court was considering whether it was proper to permit a second re-hearing or not, it would not, I apprehend, have permitted an enrolment of the decree. The only question that remains is, whether this is a case in which a second re-hearing should be allowed. It appears to me not unreasonable to permit a second re-hearing, when thereby the party desiring it will enjoy the advantage of having his case considered by three minds instead of one, and all the expense and delay of an appeal may possibly be prevented. It is said that, in order to lay a ground for a second re-hearing, the party seeking it must be able to point to some circumstance which meets the view, without entering into a consideration of the merits of the case. On the whole, I am of opinion that the second re-hearing should be permitted, but it is not a case for costs on either side. In addition to the cases above mentioned I have looked at and considered the following, namely, *Brown v. Higgs*, (a) *Blackburn v. Jepson*, (b) *Deerhurst v. Duke of St. Alban's*, (c) *Fuller v. Willis*, (d) *East India Company v. Boddam*, (e) *Barnes v. Wilson*, (f) *Mousely v. Carr*, (g) *Dearmon v. Wych*, (h) and 3 Daniel's Chancery Practice, 1618. I do not agree with the learned counsel who argued for the re-hearing, that in this case it is in the nature of an appeal to the Lord Chancellor; nor can it be necessary, I think, that this decree should be signed by the three judges.*

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(a) Ves. 56. (b) 2 V. & B. 360. (c) 2 Russ. & M. 702. (d) 11 Jur. 233.
(e) 13 Ves. 421 (f) 1 R. & M. 486. (g) 3 M. & K. 205. (h) 4 M. & C. 550

* See also *Groom v. Stinton*, 11 Jur. 895.

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STREET V. RYCKMAN.

Practice—Costs of former suit.

Where a plaintiff files a bill for relief, and both parties dying after answer, a new bill setting forth substantially the same facts, is filed by the plaintiff's heir against the defendant's heir, praying no relief but a discovery and to perpetuate the testimony of witnesses, proceedings in the second suit will not be stayed till the costs of the first are paid.

Semble: that if both suits were instituted by the same individual, and he were liable to pay the costs of the first, he would not be prevented from prosecuting the second until he had paid those costs.

This was a motion to stay proceedings until the costs of a former suit should be paid. It appeared that the bills in both suits stated in substance, that the plaintiff in the first suit had become entitled to a conveyance of certain lands from the defendant; that a conveyance was accordingly executed, but was never registered, and was afterwards accidentally burnt, and that the plaintiff had been in possession of the lands from the time the conveyance was executed. The first bill prayed that the defendant should execute a new deed. The second bill was not for relief, but for discovery, and to perpetuate the testimony of witnesses to the conveyance and to the destruction of it. An answer had been filed in the first suit, but both parties died before any further proceedings took place. The second suit was by the devisees of the plaintiff in the first, against the heir-at-law of the defendant thereto.

Statement.

Mr. *Mowat*, in support of the motion. Both suits are for substantially the same object, though they propose to accomplish it in different ways. The first would meet any future claim to the lands on the part of the defendant, by a new deed from him; the second by perpetuating testimony as to the old deed. The first suit in truth embraces all that the second does, and something more. A discovery is equally obtained in both suits; and to obtain the relief prayed for in the first, the same testimony would have to be given which the second bill asks to perpetuate.—*Onge v. Trulock*. (a) It makes no difference that the second suit is between the representatives of the parties to the first. In *Doe Felden v. Roe*, (b) the second suit was between the heirs of the parties to the first. In *Keene ex. d. Angel v. Angel*, (c) the lands

(a) 2 Mol. 41.

(b) 8 T. R. 654.

(c) 6 T. R. 740.

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 were different from those in question in the first suit, and one of the defendants was not a party to the first. In *Thurstout v. Holdfast*, (a) the defendant was the executrix of the successful plaintiff's lessor in the first suit. In *Doe Heighley v. Harland*, (b) the second suit was by the heir of the person who brought the first. In all these cases an application similar to that now made was granted; and as to these matters, it appears from *Pickett v. Laggon*, (c) that equity adopts the practice at law. It is no objection to this motion, that the costs of the first suit were not by any order directed to be paid; that was not considered a good objection in *Doe v. Langdon*: (d) *Smith v. Barnardiston*, (e) *Doe Mudd v. Roe*, (f) *Doe Standish v. Roe*, (g) were also cited.

Argument. Mr. *R. Cooper*, contra. No authority can be cited directing a plaintiff to pay the costs of a former suit, unless the relief sought is precisely the same. Here there is not anything in the prayer of the present bill inconsistent with the continuance of the first suit. Besides, the plaintiff here is only the representative of the plaintiff in the first, and is not liable for the costs thereof unless he revives.

[ESTEN, V. C.—Do you think that had you succeeded in the former suit you would have been permitted to file this bill? Are not the suits substantially for the same object?]

Had we succeeded in the first suit, it would have been unnecessary to bring this; then, we desired to be quieted in our title to the land in question, the deeds of which had been destroyed; now, we desire to perpetuate testimony which will enable us to defend our possession in any proceeding that may hereafter be taken to dispossess us.

The judgment of the court was delivered by

ESTEN, V. C.—In this case the first bill was filed for relief. The plaintiff and defendant both died, and the representatives of the plaintiff have filed a bill to perpetuate the testimony of witnesses, as against the heir-at-law of the defendant. The question is, whether they shall be at liberty to maintain the second suit, without paying the costs of the first? The object of the application is to stay proceedings in the second

(a) 6 T. R. 223.

(d) 5 B. & Ad. 864.

(g) 5 B. & Ad. 878.

(b) 10 A. & E. 761.

(e) 2 W. B. 904.

(c) 5 Ves. 702.

(f) 3 Dowl. 444

suit until the costs of the first shall be paid. In the cases that were cited in the course of the argument, all of which I have read, the first proceeding was at an end; and in most of them the plaintiff was liable to pay the costs. The question arose for the most part in actions of ejectment, and it is obvious that a particular reason exists for applying the rule to cases of that description, inasmuch as a verdict in one action of ejectment is no bar to another, and such actions may in fact be brought *ad infinitum*. The principle, however, is not confined to actions of ejectment, and it is applicable to suits in equity as well as to actions at law, although they may be instituted in different courts, but does not extend to the case of an action at law and a suit in equity subsisting at the same time. The present case exhibits the anomaly of a party being called upon to pay the costs of a proceeding which is not at an end, and in which no order exists for the payment of the costs. The suit had indeed totally abated, but it might be revived; and it did not appear but that the plaintiff, instead of paying, might be entitled to receive, costs. These difficulties are met by the case not cited in the argument of *Altree v. Horden*. (a) There the first suit had totally abated, and a second bill was filed, which was confessedly the same as the first would have been made had it been amended, as was intended upon the answers. The Master of the Rolls ordered the proceeding in the second suit to be stayed until the payment of the costs of the first. It is true he relies upon a circumstance which may not enter into every case, namely, that the plaintiff in framing the second bill derived benefit from the discovery contained in the answer to the first; but it does not appear to me that this circumstance ought to make any difference, inasmuch as if the object of the second suit can be attained by prosecuting the first, it is vexatious to commence the second, and thereby to preclude the defendants from all opportunity of obtaining the costs of the first, whether benefit is derived from the discovery in the first suit or not. Such, however, can seldom fail to be the case, and it is probably the case in the present instance. Here the

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(a) 7 Jurist, 247.

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two bills are based upon the same facts; they are between, virtually, the same parties, and are directed to the same general object of establishing the title to certain lands, the title to which is in dispute. The one bill, however, is for relief, and the other for discovery; and it does not appear, if both suits were instituted by the same individual, and he were liable to pay the costs of the first, that he would be prevented from prosecuting the second until he had paid such costs; much less can such a claim be advanced against the representatives who are not liable for the costs of the first suit; but even if the suits had been instituted by the same individual, and he would have been liable to pay the costs of the first before he could have been permitted to prosecute the second, it does not follow that the same rule would apply to his representatives, who are not liable for the costs of the first suit, and can be made to pay them only in case of vexation. No vexation, however, can be imputed in instituting the second suit, where its object is not attainable through the prosecution of the first. The representatives cannot be blamed for not prosecuting the first suit if they have been advised against it, and they cannot by amendment add the object of the new bill to the old one, or convert the old bill into the new bill. Under these circumstances, although I first thought the application a reasonable one, and felt a strong disposition to grant it, the practice of the court seems adverse to such a course, and therefore the order asked for must be refused, and with costs.

Judgment.

FISHER V. WILSON.

Pleading—Practice—Injunction—Amending bill.

Where a defendant, upon filing his answer, obtains and serves an order *nisi* to dissolve a common injunction, and the plaintiff thereupon, at any time before the actual dissolution of the injunction, amends his bill; the defendant, before proceeding with the application to dissolve, must answer the amendments or be prepared to contend that, even admitting the amendments to be true, the injunction ought to be dissolved. If he chooses not to proceed with the application to dissolve, the plaintiff must pay the costs incurred before the amendments were made.

Where a plaintiff erroneously asserts title in one capacity, but it appears from the statements in the bill that he is entitled in another capacity, the court will give him the relief he seeks.


Mr. *Connor* and Mr. *McDonald* for the plaintiff. Mr. *Cameron*, Q.C., and Mr. *R. Cooper* for the defendant. 1850.

The nature of the motion, the facts of the case, and the objections principally relied on by counsel, appear in the judgment of the court, which was delivered by

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ESTEN, V. C.—In this case it appears that one *Mary Wilson*, being entitled to some personal property under the will of her late husband, *James Wilson*, had it settled, in contemplation of her marriage with the plaintiff, subject to her appointment by writing or will, and as to such part of it as she should desire to retain for her separate personal use, in trust for that purpose. In respect to the remainder it is probable that, in default of appointment, a gift for her separate use, during her life, would be implied; but subject to this life interest and the power of appointment, the property undoubtedly vested as it would have done altogether had no settlement been executed. The marriage took place, and the plaintiff afterwards disposed of part of the property, and received the proceeds of such disposition, and collected moneys on various securities comprised in the settlement; and, having applied part of these proceeds and moneys to his own use, made three promissory notes in lieu (as the bill and answer taken together import, although not very clearly) of the moneys so applied, and deposited them amongst the other papers of his wife in her possession, where they remained until sometime afterwards, when the defendant, who was the trustee of the settlement, as such trustee, took possession of the promissory notes in question, and other papers belonging to the plaintiff's wife. Sometime afterwards, the plaintiff's wife, while she was resident in defendant's house, and while she was in a state of mental derangement, which incapacitated her from making any disposition of property whatever, was induced by the defendant to make a will, in exercise of the power of appointment contained in the settlement, disposing of the whole settled property in favour of her daughter by her first marriage, after her death, which happened in 1848; the testamentary appointment above mentioned was propounded for probate in the proper court, but probate was, after con-

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1850. testation, denied, on the ground of the mental aberration of
 *Mary Fisher* and her consequent inability to make a will.

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This sentence of the Surrogate Court remains in force unrepealed. The defendant having commenced an action on the before-mentioned promissory notes of the plaintiff, the present suit was instituted for an injunction to restrain the action and for an account of the whole settled estate. Now it must be very obvious on the foregoing statement, (notwithstanding an extraordinary claim which this defendant has advanced in his answer to this trust property, if undisposed of, for his own benefit,) that, subject to the life interest and power of appointment vested in Mrs. *Fisher*, and in the absence of any disposition of the property under an exercise of the power, the whole of it went as it would have done altogether had no settlement been made; that is to say, it devolved to her husband, the plaintiff, partly *jure mariti*, partly as her administrator, according to its nature and quality. Supposing such to have been the case, it would be plainly inequitable to permit the trustee to enforce payment of these notes, inasmuch as the plaintiff is himself beneficially entitled to the moneys secured by them. It is possible that the defendant might have had some claim upon the trust estate for expenses attending the execution of the trusts, or as connected with his office of executor, but no such claim is advanced, and we are of opinion that it was his business, if any such existed, to have set it up; on the other hand, if Mrs. *Fisher* made any valid disposition of the settled property under her power contained in the settlement, her appointee would be entitled to it, and the defendant as trustee of the settlement would be not only entitled, but imperatively bound, to reduce it into possession for the benefit of such person. The appointment in favour of the daughter is not attended to in the bill, but is set up by the answer, which therefore contained a complete defence to the suit, and upon the record as it then stood the injunction must undoubtedly have been dissolved. An order *nisi* for dissolving it was in fact obtained; but before the motion could be argued the plaintiff amended his bill, stating facts which if true completely upset the defence raised by the

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answer, and restored the parties to the same relative position as that in which they stood previously ; that is to say, the amended bill stated that Mrs. *Fisher*, at the time she made the appointment mentioned in the answer, was in a state of insanity and mental derangement, which incapacitated her from making the appointment in question, and rendered it wholly null and void. It does not appear that upon the return of the order *nisi* any formal undertaking was given to shew cause upon the merits, but the motion stood over for the accommodation of the defendant's counsel, who very candidly and fairly expressed a wish that the amendments should be considered as having been made between the service of the order *nisi* and the giving the undertaking to shew cause on the merits. We are not sure that this was not conceding too much, but it is unnecessary to consider this point more minutely, as we are of opinion that it is immaterial whether the amendments were made before or after this undertaking, must be considered as having been entered into. It is plain, from the foregoing statement, that whether this injunction is to be dissolved or not, will turn altogether upon whether the amendments are or not to be regarded in this motion, inasmuch as the answer containing a complete defence to the original bill, is in its turn entirely displaced by the amendments. This question depends upon the construction of the late order of this court, borrowed from the English orders of 1845, under which a plaintiff who has obtained the common injunction may either before or after answer obtain one order, as of course, for leave to amend his bill, without prejudice to his injunction. In deciding this question, we have not the advantage of any English decision to guide us, as the precise question presented by this case does not appear to have arisen in England since the promulgation of the order in question.

We have no doubt of the true construction of the order ; but should any decision take place hereafter in England at variance with the present, we shall of course consider ourselves bound by it. The order was no doubt intended to remedy the mischief, which frequently arose from the dissolution of the common injunction upon the coming in

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1850. of the answer, when the plaintiff had it in his power, by amending the bill, to state matter sufficient to support the injunction. In the interim between the dissolution and the revival of the injunction, the mischief which it was intended to prevent often happened. The order, therefore, as we think, enables the plaintiff, even after notice of motion to dissolve, and at any time before the actual dissolution of the injunction, to amend his bill in such a manner as to sustain it. When the bill is thus amended, the defendant must consider whether he will answer the amendments, or persevere with his motion to dissolve the injunction. Should he adopt the former course, he will be entitled to his costs of any proceedings for the dissolution of the injunction, so far as they have gone, and if they are refused, may proceed with his motion for the purpose of obtaining them, but for no other purpose. Should he persevere in his motion for its whole object, he must be prepared to contend that, supposing the amendments to be true, the injunction ought to be dissolved. The court cannot, we think, avoid looking at the amendments, when the motion is actually argued. It may be remarked that a privilege given to a defendant by this order is to enable him, if the plaintiff amends his bill before answer, to move to dissolve the injunction without answering, which he could not otherwise do. An objection, rather suggested than actually made, during the argument, was that the plaintiff is entitled to this property if at all *jure mariti*, and not as administrator. We have already observed that we consider him entitled partly by virtue of his marital rights, partly as administrator. He certainly places his title altogether on the letters of administration; but we think this of no consequence, as his real title in spite of himself appears from the facts stated in the bill. The result is, that as the court must necessarily regard these amendments upon this application, and as they completely displace the defence raised by the answer, the injunction must be continued; but under the circumstances of the case there must be no costs on either side.

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FORSYTH V. DRAKE.

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Pleading—Parties.

Such executors as have proved, may sue without making the others parties though the latter have not renounced.

The representatives of a deceased tenant for life, of an equity of redemption, are not necessary parties to a bill to foreclose, though the interest on the mortgage fell into arrear during the lifetime of the deceased.

A mortgagor having devised his equity of redemption to the trustees for his children in fee, on their attaining the age of twenty-one—*Held*, that to a bill to foreclose against the *cestuis que trust*, after they attain twenty-one, the trustees were not necessary parties.

The representatives of the survivor of several joint mortgagees cannot, merely as such, sustain a suit to foreclose, without making the representatives of the other mortgagees parties.

This cause coming on to be heard, several objections were taken, for want of parties; all of which are mentioned in the judgment of the court.

Mr. *Turner*, for the defendants, relied upon *Arnold v. Blencowe*, (a) *Venables v. East India Company*, (b) *Cheswick v. Woodham*, (c) *Gifford v. Hort*, (d) *Pierson v. Robinson*, (e) *Rigden v. Vallier*, (f) *Partridge v. Pawlet*, (g) *Vickers v. Cowell*. (h)

Mr. *Mowat*, contra, relied on *Davies v. Williams*, (i) *Wynne v. Styan*, (j) *Head v. Lord Teynham*, (k) *Whitla v. Halliday*, (l) *Spooner v. Sandilands*, (m) *Scholfield v. Heafield*, (n) *Harvey v. Cook*, (o) *May v. Selby*. (p) He referred also to Story's Eq. Pleading, sec. 167, n. 2; Story on Partnership, ss. 334 *et seq.*; and to Calvert on Parties, 212 *et seq.*

1 Eq. Ca. Ab. 290, and 1 Ch. Rep. 57, were also referred to and commented on by the defendants' counsel.

The judgment of the court was pronounced by

THE CHANCELLOR.—This bill has been filed to foreclose a mortgage made in the year 1806. At that period *William Searle*, being seised of the premises in fee simple conveyed them to *Ebenezer* and *Robert Reynolds* for five hundred years, by way of mortgage, to secure the sum of £740; of which amount the sum of £312 10s. was to be paid in April, 1806, and the residue in February, 1808.

Judgment.

On the 11th of August, 1806, *Ebenezer* and *Robert*

(a) 1 Cox. 426.

(b) 12 Jurist, 855.

(c) 4 M. & G. 811.

(d) 1 S. & L. 386.

(e) 3 Swans. 139.

(f) 2 Ves. Sr. 252.

(g) 1 Atk. 467.

(h) 1 Beav. 529.

(i) 1 Sim. 5.

(j) 2 Ph. 303.

(k) 1 Cox. 57.

(l) 4 Dru. & W. 267.

(m) 1 Y. & C.C.C. 390.

(n) 7 Sim. 667.

(o) 4 Russ. 34.

(p) 1 Y. & C. 235.

1850. *Reynolds* assigned the residue of their term in the premises, and the amount then remaining due (being £457 13s. 2d.) to *Thomas Forsyth*, *John Richardson* and *John Forsyth*, in consideration of the sum still remaining due, paid by the grantees to the grantors.

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William Searle died in 1822, having duly devised the premises in question, with his other real estate, to his wife for life, and after her death to *Robert Richardson* and *William Duff*, in trust for his grandchildren, *Jane McCormack* and *William Drake*, upon attaining the age of twenty-one.

Upon the death of her husband, *Elizabeth Searle* entered into possession of the mortgaged premises, and continued in occupation to the period of her own death, which took place in 1828.

The bill alleges that *Jane McCormack* and *William Drake* are of full age, and are seised of the reversion in fee simple, and entitled to the equity of redemption under the will of their grandfather.

Judgment.

It is stated that *Thomas Forsyth* died in the year 1828, and *John Richardson* in the year 1831; and the surviving assignee of the mortgage term (*John Forsyth*) is said to have died in 1837, intestate as to the mortgaged premises, but having first duly made his will, and constituted the plaintiffs and one *George Gregory* his executors, all of whom survived him, as did also the other plaintiff *William Forsyth*, his heir-at-law. *Gregory* renounced probate of the will, which was proved by *John Blackwood Forsyth* alone, in the proper court.

At the hearing, several objections were taken for want of parties. It was urged, first, that *Gregory*, the remaining executor named in the will of *John Forsyth*, should have been a party; secondly, that the personal representative of *Elizabeth Searle* should have been a party; thirdly, that the trustees named in the will of *William Searle* should have been before the court; and, lastly, that the personal representatives of *Thomas Forsyth* and *John Richardson* are necessary parties.

We think there is nothing in the first objection. *Ches-*

wick v. Woodham, and *Venables v. East India Company*, 1850. were cited for the defendants; but they obviously have no application. The form of renunciation, and its effect, were there discussed; but the rule here and at law is different, and without reference to the question of renunciation, such executors as have proved are alone necessary parties. *Dyson v. Morris* (a) is a recent case.

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We do not think the allegation that the interest had fallen in arrear during the lifetime of *Elizabeth Searle*, renders it necessary, as was contended, to make her personal representative a party. The mortgagee's remedy is against the land; he has nothing to do with the state of accounts between the defendants and the estate of the deceased tenant for life. *Baker v. Wetton* (b) was mentioned as in point. In the report of that case in *Simons*, no notice is taken of any objection for want of parties. In the *Jurist*, however, we find the point reported; but it is quite inapplicable. The bill there was to redeem, and alleged that debt and interest had been more than paid by receipt of rents and profits. Obviously, those who had received the rents and profits, or their representatives, were necessary parties. *Wynne v. Styan* is in point against the objection.

Judgment.

As to the third ground of objection, we think it clear that the grandchildren of the testator are competent to maintain this suit. But we are of opinion that the last objection must prevail. At law, no doubt, the debt and security would have survived to *John Forsyth*; but in equity, the assignees are regarded as tenants in common. (c) The personal representatives of *Thomas Forsyth* can no more sustain this suit alone, than could the personal representatives of either of the other assignees. In the eye of a court of equity, they are equally interested. But it has been argued, that the assignees of this mortgage security were partners in trade; and that, inasmuch as it would have been competent to the surviving partner to have received this partnership debt, and to have given a sufficient discharge, it must be also competent to him, or his representatives, to sustain this suit for its recovery.

(a) 1 Hare, 413. (b) 14 Sim. 426. (c) *Vickers v. Cowell*, 1 Beav. 529.

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Assuming that a surviving partner might sustain a suit of this sort under such circumstances (upon which we give no opinion) no such case has been made by this bill. It is argued, however, that the fact appears upon the deed of assignment; and that, it is submitted, is sufficient. It does indeed appear upon the deed, and in the evidence, that these assignees were partners in trade; but assuming that to be sufficient, it can hardly have been meant to contend, we think, with any hope of success, that upon any known principle of pleading, it can be competent to a plaintiff to gather from the evidence the character in which, and the facts upon which, he thinks it possible to sustain his suit, and then to ask the court to pronounce a decree in his favour upon those facts and in that character, in the absence of all allegation to warrant such proceeding. Yet, were it possible to maintain so strange a proposition, it could not avail the plaintiffs here. All that appears upon the evidence is, that the assignees had been partners in trade; but to sustain the suit upon the principles suggested, very much more must have been established. These gentlemen may have been partners, and yet this advance may have been made from private funds, in no way involved in the partnership concerns; and although the advance had been made originally from partnership funds, it would still have been necessary for the plaintiffs to have stated facts shewing a title in themselves to sustain the suit alone. The bill in *Dyson v. Morris*, to which we referred above, was framed in that manner. Had all the necessary facts appeared in the evidence, we could not have given effect to them in the absence of proper allegation in the pleadings; (a) but they appear neither in the evidence nor in the pleadings.

The case must therefore stand over, with liberty to amend by adding parties as plaintiff or defendant, as the plaintiffs may be advised.

(a) *Holland v. Baker*, 3 Hare, 68; *Stewardson v. Harrison*, 2 Hare, 53.

LE TARGE V. DE TUYLL.

1850.

Mortgage—Parol evidence—Absent parties.

Where an absolute conveyance is executed with a parol agreement for redemption, and the grantor continues in possession—if the parties so deal with one another as to render such possession clearly referable to the parol agreement, as by demand and payment of the debt or interest, or some part thereof—such parol agreement will be enforced in equity.

Semble.—The circumstances of a grantor continuing for years in possession of property after execution of an absolute conveyance, is alone sufficient to let in parol evidence of the parol agreement for redemption, in pursuance of which such continued possession took place.

Semble also.—Where it is clear from written evidence that the agreement really made between parties to a deed, is not that stated in the deed, but the written evidence does not shew what the actual agreement was, parol evidence of it is admissible.

The residence out of the jurisdiction of the court, of a party having a substantial interest, is not now a sufficient reason for proceeding in his absence, where it would have been so, when persons out of the jurisdiction could not in England be served with process; it must also be shewn now to be impossible to effect service upon such absent party. But this is not necessary in case of merely formal parties, nor perhaps of parties having but secondary or unimportant interests.

Mr. C. and Mr. R. Cooper for plaintiff. Mr. Crickmore for defendant.

The facts of the case, the arguments of counsel, and the authorities cited, are sufficiently stated in the judgment of the court, which was delivered by

THE CHANCELLOR.—The plaintiff represents himself (and Judgment. his representation is sustained by evidence) to be a Frenchman, imperfectly acquainted with the English language, and little conversant with the transaction of business. During the years 1834 and 1835, he had various dealings with one *Taylor*, the testator in the pleadings mentioned, who at that period and subsequently carried on business at Gode-rich, as a merchant, which dealings resulted in his becoming indebted to *Taylor* in the sum of £89 7s. 11d. For the purpose of securing this debt, as the plaintiff alleges, he conveyed the premises in question in the cause to *Taylor* on the 29th of June, 1835. The instrument in question purports to be an absolute conveyance of the premises in fee simple in consideration of the sum just mentioned. The plaintiff, however, asserts that it was intended to operate as a mortgage merely, and that he had been led to believe that such was its effect, and that in pursuance of such understanding he continued in possession for several years after the execution of the instrument in question, and made vari-

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ous payments on account of the debt, for some of which he holds the receipts of *Taylor* himself, and for others the receipts of various clerks formerly in his employment. It appears that *Taylor* commenced an action of ejectment against the plaintiff some time during the year 1838, (the precise date is not fixed,) to recover possession of these premises. The plaintiff's allegation is, that he learned only a short time prior to this action, that the deed which he had executed was an absolute deed, and not a mortgage, and that so soon as proceedings were commenced, he employed one *Stewart* as his attorney to obtain a settlement of his accounts with *Taylor*. *Stewart* accepted the plaintiff's retainer; and having been informed of the foregoing facts, and apprised of the plaintiff's belief that upon receiving credit for all payments, his indebtedness would be found inconsiderable, he entered into negotiations with *Taylor*, in the course of which *Taylor* admitted that he held the premises in question only as security, and would restore them on payment of his debt.

Judgment.

No settlement, however, was effected. The action of ejectment proceeded, and *Taylor* having obtained judgment, was put in possession by the sheriff under a writ of *habere*. *Taylor* continued in possession of the property till 1840, when he died, having first duly made and executed his will, by which *De Tuyll*, one of the defendants to this suit, and *Antoniette Taylor*, testator's wife, were constituted executor and executrix of his will, and empowered to sell all the testator's real estate for payment of his debts. The surplus, after payment of all debts, was given to *Antoniette Taylor*, to whom the testator bequeathed all his personal estate. *De Tuyll* alone proved this will, and, having entered into possession of the testator's real estate, contracted to sell the premises in question to one *Rattenbury*, the other defendant to this suit, some time in the course of the year 1841, for the sum of £150. Under this contract, *Rattenbury* became bound to pay, and did in fact pay £75, one half of the purchase money, in hand, and agreed to pay the residue in three equal annual instalments, and was thereupon let into possession. *De Tuyll* signed a bond, by which he obliged himself to execute a guarantee deed (as it is termed

in the contract) so soon as he should himself receive a title from the sheriff of the Huron district, by virtue of certain proceedings upon a judgment against *Taylor*, under which the sale of his real estate seems to have been contemplated. In case he should fail to obtain this title, *De Tuyll* stipulated to pay the purchase money, and reimburse *Rattenbury* such sums as he might in the interim expend in improving the premises. No further payment has been made on account of purchase money. The bill contains various charges, by which the plaintiff seeks to affect *Rattenbury* with notice of his equitable title, and much of the evidence is directed to the same point. But I need not further allude to this branch of the case, because it is conceded that *Rattenbury* has not yet either paid his purchase money or received his conveyance; and it is therefore quite manifest that his contract is subject to such title as the plaintiff may be able to establish against *De Tuyll*, which is all that need at present be determined.

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The defendants, by their answers, assert their ignorance of any agreement to reconvey the premises in question, as well as of the partial payments set up by the plaintiff. They say they are strangers to all these matters, and rely upon the deed of June, 1835, as having conferred upon *Taylor* an absolute title. They do not, however, claim the benefit of the Statute of Frauds, neither do they object to the case made by the plaintiff as contravening either that statute or the common-law rule of evidence.

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At the hearing, the learned counsel for the plaintiff argued, that it was clear upon the evidence that the deed of June, 1835, did not contain the real contract of the parties, which was in fact a mortgage to secure a debt, and not a sale; and he submitted that parol evidence is admissible to ascertain the true intent and meaning of the parties, notwithstanding the deed, on three grounds: first, because the defendants have not claimed the benefit of the Statute of Frauds by their answer, and must therefore be regarded as having waived it; secondly, because the fraud alleged and proved takes this case out of the statute, inasmuch as it avoids the deed, and so necessitates the receipt of parol evidence to ascertain the terms of the contract; thirdly,

1850. because parol evidence is always admissible, on the question
 “mortgage or no mortgage.”

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Upon considering the evidence in the cause, we are of opinion that it establishes the position contended for by the plaintiff, namely, that the parties intended the deed of June, 1835, to operate as a security, and not as an absolute sale, if the evidence can be properly received for that purpose. But the defendants contend, that the deed of June, 1835, is conclusive, and the proposed evidence inadmissible; and they further submit, that *Antoniette Taylor* and the heir-at-law of the testator are necessary parties to this suit.

Judgment.

In regard to the first objection, we think the defendants entitled to resist the reception of parol evidence at the hearing, notwithstanding their omission to take the objection by answer. The rules upon the subject seem now clearly settled, whatever doubt may formerly have prevailed as to some of them. A plaintiff claiming under an agreement within the Statute of Frauds, is not bound in his bill to aver that the statutory requirements have been complied with. Nevertheless, at the hearing, his proof must be in accordance with the statute, unless circumstances are established to take the case out of its provisions. A defendant, on the other hand, though admitting the agreement sued upon, may still protect himself by the statute. But should he, while admitting the agreement, omit to crave the benefit of the statute, he would at the hearing be precluded from urging the objection. That case would be taken out of the statute. The danger of perjury would be obviated by the admission in the answer, and then the defendant's omission to set up the statute would be properly regarded as a waiver. But where, as in this case, the answer contains no admission of the agreement, the omission to claim the benefit of the statute cannot help the plaintiff's case; the answer being silent, there is nothing to take the case out of the statute. This throws it upon the plaintiff to establish his allegation by proof in accordance with the provisions of the act, which cannot be done by parol evidence.

Skinner v. McDouall (a) was cited by the defendant; but that case is clearly not an authority in his favour. There the cause was heard on bill and answer. All the evidence adduced by the plaintiff consisted in admissions of the defendant; but the defendant did not claim the benefit of the statute; and consequently, the case being taken out of the statute by the admissions of the defendant, for all the purposes of substantial justice, the technical objection was properly considered as waived by his omission to claim the benefit of it. The judgment is not opposed to the law as we have stated it, but is in accordance therewith. It plainly has no application here.

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As to the second objection, there can be no doubt that where a deed fails to embody the contract of parties, by reason of fraud, accident, or mistake, parol evidence must be admitted. Upon the hypothesis, the deed does not express the true intent; and to permit it, notwithstanding, to prevail under such circumstances, would be so obviously to further instead of repressing fraud—to treat such a deed as the exclusive medium of ascertaining the intention, would be so plainly to subvert the Statute of Frauds—that recourse is had to such evidence as the nature and circumstances of the case permit. In this respect, the rule in regard to mortgage transactions does not differ from the rule applicable to other contracts. But we are of opinion that in this case no evidence has been adduced, which would warrant us in concluding that the deed has failed to express the intention of the parties, in consequence of any fraud, accident, or mistake. The plaintiff's imperfect acquaintance with the English language, and his unskilfulness in matters of business, have indeed been established to our satisfaction; other circumstances there are, too, sufficient to excite suspicion. But no evidence has been adduced as to the dealings of these parties in relation to this contract, either prior to or at the time of its completion. Neither of the witnesses to the deed has been examined. To invalidate a conveyance of land made for valuable consideration upon the ground of fraud, under such circumstances, would be to introduce such uncer-

Judgment.

1850. tainty into all dealings, as could not fail to prove destructive of the best interests of the community.

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Judgment.

We are referred to the cases collected in the American edition of Mr. *Phillips'* book on Evidence, as establishing the proposition, that parol evidence is always admissible upon the question, "mortgage or no mortgage." (a) Undoubtedly, legislative provisions in some instances, and varying judicial interpretation in others, have rendered it difficult for a foreigner to ascertain the true state of the law in that country upon this subject. In some states, (as New York,) parol evidence seems admissible, without reference to circumstances; but this is confessedly a departure from the English rule. Indeed we have nowhere found a decision affirming the position taken by the plaintiff here, as the result of English authority: on the contrary, some American writers (as Mr. *Story*) seem to lay down the rule more narrowly than reason and authority appear to us to warrant. But although we think that the law of England, by which we are governed, knows no distinction between mortgage and other contracts, in this respect, and that the question whether parol evidence should or should not be received, is to be solved on principles generally applicable; and although we feel clear that the evidence offered in this case could not be received without reference to the subsequent dealings of these parties, yet we are of opinion, that the peculiarities inherent in this kind of contract, lead to results different from those at which we would arrive from the application of the same principles of law to contracts of a different nature; that the effect of this peculiarity, coupled with the subsequent dealings of the parties, is such as to render the parol evidence which has been taken admissible; and that upon that evidence, the plaintiff is entitled to the relief he asks.

Recent cases throw very little light upon this subject; neither is it very easy to extract any explicit rule from the older decisions. On the other hand, text-writers of deserved celebrity employ language which, if understood without

(a) Cowen and Hill's Notes. pp. 1422, 1432, 1453.

qualification, seems to us unwarranted upon principle and unsustained by authority. Mr. *Butler*, in a note to Coke upon Littleton, (a) says: "In many of these cases, the courts have found it necessary not only to apply their general principles, but to determine the fact whether the conveyance was intended as an absolute sale or a security for the money. If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into possession of the estate; if, instead of receiving the rents and profits for his own benefit, he accounted for them to the grantor, and only retained the amount of interest; or if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered by the courts as tending to prove that the conveyance was intended to be merely a security." And Mr. *Fonblanque*, in a note to be found in the Treatise on Equity, says, (b) "But parol evidence is admissible to shew or explain the real intention and purpose of the parties, though the conveyance be absolute." The rule to be found in the text-writers upon this subject: *Powell*, (c) *Coventry*, (d) *Coote*, (e) is equally broad.

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But without determining the fitness or unfitness of any abstract proposition to be found in these books, further than has been already done, we are of opinion that in the case before us, there has been such a dealing upon the faith of the contract sought to be established, as obliges us, upon the clearest principles of justice, to admit evidence of that contract, and enforce its complete observance. The plaintiff continued in possession of the premises in question, notwithstanding the deed of 1835, for several years subsequent to its execution, and made various payments on account of an amount stated in that deed as purchase money paid to the plaintiff, and not as a debt due; and all this he asserts to have been done under a parol agreement, which he asks to be allowed to establish. Can we reject this evidence, and permit the plaintiff to be treated as a trespasser, and made accountable for the rents and profits of

(a) Butl. Co. Litt. vol. 2, p. 205, note 96.

(b) 2 Fonb. 263. N. h.

(c) Powell, M. 15. (d) Ib. 125, a. N. p.

(e) Coote, 25.

1850. the estate, consistently with those principles of justice which the Statute of Frauds was designed to conserve? *Le Targe v. De Tuyll.* The grounds upon which part performance has been treated as taking cases out of the statute, are stated by Lord *Redesdale* with great clearness, in the course of his judgment in *Clinan v. Cooke*. (a) He says, "But I take another reason also to prevail on the subject; *I take it that nothing is considered as a part performance, which does not put the party into a situation that it is a fraud upon him unless the agreement is performed.* For instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of *Foxcraft v. Lister*. (b) There, the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer, and to account for the rents and profits. And why? Because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and if it was admissible for such purpose, there is no reason why it should not be admissible throughout." And again, in *Bond v. Hopkins*, (c) "The Statute of Frauds says, 'That no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with^s it.' And yet the court is in the daily habit of relieving where the party seeking relief *has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief.*" The same doctrine was announced by Lord *Eldon*, in *Morphett v. Jones*, (d) "A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed." It is true that in cases like that now under our consideration, possession is not changed upon the contract, but possession is *continued* in direct opposition to the written contract; and one feels strongly that to suffer a mortgagor

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(a) 1 S. & Lef. 41.
(c) 1 S. & Lef. 413.

(b) Prec. ch. 519.
(d) 1 Swans. 181.

who continues in possession under a parol contract for redemption, to be treated as a trespasser and charged with rents and profits, would be to sanction a fraud as flagrant as could occur in any case that can be suggested. But whatever the result may be, where continued possession is the *only* circumstance upon which the admission of parol testimony is rested, we think that no doubt can exist where the parties have so dealt as to render such continued possession clearly referable to the parol agreement—as for instance, by the demand and payment of interest, or the demand and payment of the debt, or any portion of it, which has been the case here. But we are further of opinion, that the peculiar nature of this species of contract is such as renders payment of interest or payment of principal under the parol contract, such an act of part performance as takes the case out of the statute. Where that which is in reality but a loan, and a pledge of property to secure that loan, appears from the form of the deed to be an absolute sale, then that portion of the real transaction which rests in parol, may be regarded either as a qualification of the written contract, or as a distinct agreement to re-convey the pledged property upon payment of the debt. Now, although the effect of an absolute deed, such as was executed in this instance, might be such, had the parties acted upon its letter, as to estop both sides—the one from asserting that to be a debt which has been declared to be purchase money, and the other from treating as a mere pledge that which had been declared to be a sale (a)—yet, beyond doubt, such may have been in fact the true nature of the contract. There is no rule of law to prevent these parties from acting upon that which is their real contract; and if, disregarding the written terms, they elect to act upon the real contract—if the one demand his debt and the other pay it—under such circumstances we think the court should not permit a mortgagee to perpetrate a fraud so gross as would result, were he heard to insist upon the written instrument as the exclusive evidence of the actual contract. He has suffered the mortgagor so to act upon the faith

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(a) Baker v. Dewey, 1 B. & C. 704.

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Judgment.

of the parol agreement, as to entitle him to offer evidence of its terms, and insist upon their observance. It is true that payment of purchase money has been held not to be such a part performance as will take the case out of the statute (a). That determination may be warrantable upon the peculiar structure of the act, having reference to the provision respecting sales of personalty. Whether it be equally justifiable upon general principles, is perhaps not so clear. One cannot help feeling that a party, who has paid his purchase money under a parol agreement for the sale of land, may have a strong ground for insisting that the vendor who has permitted that payment upon the faith of such agreement should no more be heard to deny its existence than in other cases of part performance, where this argument has been allowed to prevail. The fraud upon him may be as certain and as injurious. It is said, indeed, in answer to this argument, that the parties are not placed in a position in which the refusal to act upon the parol contract would operate as fraud; because the purchaser may bring an action, and recover the purchase money paid upon such void contract. The consideration has failed, and the money may therefore be recovered. How far this reasoning is satisfactory, how far this right of action can be properly considered equivalent to repayment, we need not determine, because we think the reason inapplicable to this species of contract. This money has not been paid upon a purchase of land; it has not been paid upon a contract, the consideration of which has failed; the mortgagor has *repaid a debt*, and asks a reconveyance of his land in accordance with the real contract of the parties. Upon what principle can we decline to afford him this relief? Had the deed executed by the plaintiff been a mortgage without covenant to pay, instead of being in its present form, the original debt from the plaintiff would not have been merged—it would have been regarded as still subsisting, and the mortgagee (*Taylor*) might have brought assumpsit for its recovery. (b) Here, if, instead of treating this deed as con-

(a) *Clinan v. Cooke*, 1 S. & L. 22.

(b) *South Sea Co. v. Duncumb*, 2 Str. 919; *Yates v. Aston*, 4 Q. B. 182.

taining the actual agreement, the parties elect to treat the purchase money as a debt still subsisting, and the land as a mere pledge; and if upon the faith of such agreement the plaintiff has repaid such debt, can the mortgagee be allowed to stand upon the deed as the exclusive evidence of his contract? To give effect to such an objection, would be to sanction a gross fraud; from which the plaintiff can only be protected by enforcing the true agreement, because he has paid his money, not upon a consideration which has failed, as in a sale of land void under the statute, but has repaid a debt which both parties elected to consider as still subsisting; thus converting the mortgagee into a mere trustee for his benefit.

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But there is yet another principle, upon which we consider the plaintiff entitled to read the evidence he has adduced. The facts heretofore pointed out as favourable to the plaintiff's case may be established by parol testimony exclusively. They do not depend for their effect on the mode of proof. But it is clearly settled, that although a deed be absolute, as in this case, yet, if the transaction were in reality a mortgage, that fact may be established by any writing under the hand of the mortgagee, no matter whether connected or unconnected with the deed. A letter will suffice. (a)

Judgment.

The cases seem to go further, warranting this proposition: that where it is clear from the written evidence that the agreement really made between the parties was not that stated by the deed, parol evidence will be admitted. Such is the language of Lord *Kenyon*, in the case of *Cripps v. Gee*; (b) and in the course of his judgment he says, "Here is evidence from the parties themselves, (a receipt for interest,) that the transaction was not what the deed purports it to be. This introduces *Hunt's* evidence." Upon this principle, the keeping of accounts by the mortgagee, charging interest and crediting payments, as also other entries of a similar character, have been held suffi-

(a) *Maxwell v. Montacute*, Prec. Chan. 526; *Vernon v. Bethell*, 2 ed. 110; *Joyness v. Statham*, 3 Atk. 388.

(b) 4 B. C. C. 472.

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 cient to take the case out of the statute. Considering the plaintiff's case sufficiently clear upon the other grounds, we only mention this last point. But we have not thought it right to pass it over altogether; because questions of this character are of very frequent occurrence, and the authorities upon the subject somewhat obscure.

Judgment. Looking, then, to the evidence adduced, we think it sufficiently appears that the parties intended the deed of 1835 to operate as a mortgage, and not as a sale. We hesitated for some time whether it would not be proper to refer it to the master, to enquire whether the payments, which the plaintiff has established beyond doubt, were or were not made upon this particular transaction. Upon this point, both parties have avoided the very evidence, the production of which would seem most natural. But considering the small value of the property in dispute, and the poverty of the plaintiff, we have been anxious as far as possible to avoid further expense; and upon a careful consideration of the evidence, we have arrived at the conclusion, that the fair intendment of the whole is, that these payments were made upon the loan. Besides, the defendants had full notice of the case upon which the plaintiff relied; and had the facts been other than he represented them, the defendants might have shewn that; the evidence was in their power.

From the circumstances just alluded to, and from the difficulty experienced by the plaintiff in bringing the proper parties before the court, in consequence of which the cause has already stood over more than once, we have felt it right to consider the case upon the merits, as it at present stands, in the hope of being able to cut short if possible so ruinous a litigation. But we feel bound, however reluctantly, to give effect to the objection, for want of parties. Neither has the record been properly framed, nor is the evidence such as to warrant us in pronouncing judgment in the absence of *Antoniette Taylor*. Assuming that we might proceed against the executor where the co-executrix is out of the jurisdiction, and assuming that it would be possible to give the plaintiff some relief in the absence of the *cestui*

que trust, the person substantially interested in this suit, 1850.
(upon which points we pronounce no decided opinion,) still
it is obvious the *cestui que trust* should have been made a
party, and process prayed against her on coming within the
jurisdiction (a).

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But had the record been correctly framed, we consider the evidence insufficient. It seems to shew, possibly with sufficient clearness, that *Antoniette Taylor* is not within the jurisdiction of the court; and had she been a mere formal party, we should probably have held it sufficient. This course of proceeding was, however, introduced *ex necessitate*, on account of the *impossibility* that formerly existed of serving parties out of the jurisdiction; (b) and such proof as was formerly deemed sufficient, may suffice perhaps where the interest of the absent party is secondary and unimportant. But we are of opinion that where the court is asked to proceed in the absence of a party having a substantial interest, as here, it will no longer suffice to allege and prove the party to be out of the jurisdiction; because that fact no longer incapacitates the plaintiff from bringing such party to a hearing. A party may now be served with process and brought to a hearing in this country, with more facility, in some instances, when out of the jurisdiction than when within it. The allegation, therefore, and proof, must do more than establish that the party is out of the jurisdiction; it must shew an impossibility to effect service. But here the affidavits, so far from convincing us that service is impossible, lead our minds strongly to the conclusion that with due attention service may be effected without difficulty.

Judgment

We pronounce no opinion upon the point, whether this is one of that class of cases in which any decree can be made in the absence of *Antoniette Taylor*. Possibly some relief can be afforded. At present, we merely determine that it is impossible for us to proceed upon the evidence now before us, consistently with justice or the settled practice of the court (c).

(a) *Munoz v. De Tastet*, 1 Beav. 109.

(b) *Cowslad v. Ciley*, Pre. Ch. 83; *Tanfield v. Irvine*, 2 Rus. 149.

(c) *Brown v. Blount*, 2 R. & M. 83; *Stratton v. Davidson*, 1 R. & M. 484.

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McNAB V. GWYNNE.

March 1,
and April 5.

Pleading—Practice—Demurrer—Amendment—Supplemental bill.

The defendant in his answer stated the fact of his having proceeded to trial and assessed damages since the filing of the original bill; the defendant thereupon filed a supplemental bill, stating those facts more fully, and also the amount of the verdict recovered; to this bill the defendant demurred, on the grounds, amongst others, that this new matter was not material, and ought to have been introduced by way of amendment. Demurrer overruled, it appearing that the amount of the verdict (which was not given in the answer) might be the point on which the whole case would turn.

Although matters which have occurred since the filing of the original bill, when stated in the answer, or other matter explanatory thereof, may be introduced by amendment into the original bill, still no authority exists for holding it irregular to file a supplemental bill, for the purpose of stating such matter.

Statement.

The bill in this cause was filed to restrain an action at law, brought by the defendant against the plaintiff, on a covenant against incumbrances, contained in the conveyance of certain lands sold by the plaintiff to the defendant, alleging as a breach thereof the existence of a mortgage at the time of the execution of the conveyance, in favour of the Bank of Upper Canada. The bill charged that the defendant, at the time of the sale, was aware of the existence of this incumbrance, and that it had been agreed between the parties that the plaintiff should remove it out of the way; that in consequence of the plaintiff's absence from the country, he had been unable to have the mortgage released until nearly two years after the sale to defendant; that defendant was proceeding at law upon the covenant, notwithstanding his knowledge of the facts; and that plaintiff conceiving he had not any defence at law, had allowed judgment to go by default—upon this bill the common injunction had been obtained for default of answer.

The defendant proceeded with his action at law, and obtained a verdict for the full amount of the purchase money; he then answered the bill, stating the fact of interlocutory judgment having been signed, the assessment of damages and the verdict, but omitted to state the amount thereof. The plaintiff thereupon filed a supplemental bill, setting forth those facts more fully, and also the amount of the verdict, as also that the lands had been seized under an execution issued against the defendant; that defendant

refused to reconvey the premises or to waive his verdict for any thing more than nominal damages, but, on the contrary, insisted upon retaining the property, now freed from all incumbrances, and also the right to enforce payment of the full amount of the verdict.

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To this supplemental bill the defendant demurred, on the grounds (amongst others set forth in the judgment) that the supplemental matter was immaterial; and that having been stated by the defendant in his answer to the original bill, it could and ought to have been introduced into that bill by amendment.

This demurrer now came on for argument, and

Mr. *Gwynne*, in support of the demurrer, cited *Knight v. Mathews*, (a) *Adams v. Dowding*, (b) *Colclough v. Evans*, (c) *Parker v. Constable*. (d) If the statements in the bill are true, then defendant is entitled to nominal damages, and nothing further; this court ought not, therefore, to have interfered in the first instance on the principle "*de minimis non curat lex*." Had the facts been as plaintiff states them, they could have been shewn at law in reduction of damages; and if the plaintiff, misunderstanding the object of the action at law, omitted to make any defence before the jury, he could, after the verdict had been rendered, have applied to the court in term time for a new trial, or to reduce the amount of the verdict.

Argument.

Mr. *Vankoughnet* and Mr. *R. Cooper*, contra.

Here, it appears, substantial damages have been recovered, when even according to the strict rules of the common law, nominal damages were all that the defendant was entitled to recover; although in good conscience, equity and common honesty, as between man and man, the defendant ought never to have taken proceedings against the plaintiff. This court will therefore interfere to relieve the plaintiff from so unconscientious a demand. The only question here is, whether these facts have been properly brought before the court by a supplemental bill? We submit, that all these facts—or at all events the most important of them—having

(a) 1 Madd. 566. (b) 2 Madd. 53. (c) 4 Sim. 76. (d) 10 Jur. 125.

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occurred after the original bill was filed, the proper means have been adopted to bring them before the court.

April 5th.—The judgment of the court was now delivered by

Judgment. ESTEN, V. C.—In this case the plaintiff sold a piece of land to the defendant, and in the conveyance executed on that occasion, entered into general covenants for title. In fact, at this time a mortgage existed, which covered this and other lands, but which, without any disturbance of the defendant, was discharged, so far as regarded the lands in question, about two years afterwards, when the property was reconveyed by the mortgagee to the plaintiff in fee. Some misunderstanding having arisen between the plaintiff and the defendant, the latter commenced an action upon the covenants for title in the conveyance, which were in strict point of law broken by reason of the existence of the mortgage in question, from the time they were entered into. After the defendant in equity had signed interlocutory judgment in the action, for want of a plea, the present bill was filed, alleging that the existence of the mortgage in question was known to the defendant or his agent at the time of the execution of the conveyance, and that the conveyance was executed on the understanding that the mortgage was to be discharged so far as regarded these lands by the plaintiff, without trouble or expense to the defendant. The common injunction was obtained for want of answer; and in the interval between the filing of the bill and the coming in of the answer, the defendant assessed his damages and obtained a verdict, and entered up judgment for the whole amount of his purchase money, interest and costs. The answer was then filed, which stated the assessment, verdict and judgment, but not the amount of the damages; and denied the understanding or agreement mentioned in the bill with respect to the discharge of the mortgage, or rather denied that the conveyance was executed on any other understanding than that which appeared on the face of it; and denied also all knowledge of the mortgage on the part of the defendant, until some time after the execution of the conveyance. A motion was

made, upon filing the answer, to dissolve the injunction; which, however, was continued to the hearing. This supplemental bill is then filed by the plaintiff, stating the trial, verdict, judgment, the amount of the damages, and that the lands had been sold, or offered for sale, or were about to be sold at the instance of a judgment creditor of the defendant, and were subject to judgments existing against him, and praying that the defendant might be enjoined, as prayed by the original bill, or might be directed to reconvey the lands to the plaintiff, free from incumbrances. To this bill a general demurrer has been put in, on various grounds; and the question is, whether on all or any of these grounds this demurrer is to be allowed or overruled? I shall in the first place consider the first and last grounds of demurrer, which are so connected as to make it proper to consider them in conjunction; and then the others in the order in which they occur. The first ground of demurrer is want of equity; the last, immateriality. Before we can allow the first ground of demurrer, namely, the want of equity, we must decide that there is no equity in the original bill; for supposing the original bill to state an equity, and the supplemental bill to state something material to that equity, and supplemental in its nature, the equity of the original bill would support the supplemental bill. Now we are of opinion that it would be improper to prejudge the whole cause upon the argument of this demurrer—which, however, would be the effect of allowing the demurrer for want of equity; and therefore that that ground of demurrer must be overruled. Then, supposing the original bill to state a case of equity, does the supplemental bill state any thing material to that equity, and supplemental in its nature? The defendant contended, that all that was stated in the supplemental bill, had been previously stated in the answer; and that, therefore, on the authority of *Knight v. Matthews*, it might, if necessary, to be stated at all, have been introduced upon the record by amendment of the original bill. It is to be observed, with respect to the case of *Knight v. Matthews*, that Sir Thomas Plumer, who decided it, said in a subsequent case, that in deciding it he relied principally upon another ground than that for

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1850. which it has been cited in this argument, and one which, I understand, cannot be maintained, namely, that a defendant, having answered the original bill, cannot demur to an amended bill; and that Sir *Edward Sugden* explained the case of *Knight v. Matthews* in the argument, of one of the cases which have been cited on this occasion, on the principle that the defendant, having put the supplemental matter upon the record by his answer, could not object to the plaintiff's introducing it by amendment into his bill. It is to be remarked also, that in the case of *Catton v. Lord Carlisle*, (a) which was decided by the same judge as *Knight v. Matthews*, and four years afterwards, the supplemental bill contained matter of precisely the same nature as that which was introduced in *Knight v. Matthews* by amendment into the original bill, and it was held not to be irregular. Upon the whole, we consider, that although under certain circumstances matter which has occurred since the filing of the original bill, when stated in the answer, or other matter explanatory of it, may without impropriety be introduced by amendment into the original bill; yet no authority exists for holding that a supplemental bill, stating such matter, can be objected to for irregularity. The present case, however, steers clear of all these authorities. The answer, as already observed, does not state the *amount* of the damages recovered in the action, although it states the assessment, verdict and judgment. Now, in the only view which we have been able to form of the equity of this case, the mere *amount* recovered, as distinct from the fact of its recovery, may be the point upon which the whole case may turn; for if it should appear that the defendant had entered into such an agreement as that alleged in the bill, and that the damages were addressed to the injury which the defendant might possibly have sustained in consequence of the omission to discharge the incumbrance for nearly two years after the execution of the conveyance, we cannot understand any principle upon which the court would interfere to restrain these proceedings. If, however, the defendant, instead of seeking damages propor-

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tionate to the injury he had sustained, should demand and accept the whole amount of his purchase money, an equity may be supposed to exist, to warrant the interference of the court. The *amount* recovered, therefore, as distinct from the fact of its recovery, may be the most material fact in the cause. It was important to consider whether this fact could or could not have been proved upon the record as it stood, before the supplemental bill was filed, as in that case it might be deemed that the supplemental bill was unnecessary. The original bill stating the commencement of the action and the signing of interlocutory judgment, and the answer stating the trial, verdict and judgment, it might be supposed that the amount recovered might be shewn without being specifically mentioned any where on the record. It is clear, however, that in the only view which we have been able to form of the equity of this case, the court could not decide without proving this fact; and we cannot undertake to say that a supplemental bill, stating a fact upon which the whole case may turn, is an unnecessary proceeding. Upon these grounds the demurrer for want of equity, and that for immateriality, must be overruled. The other grounds of demurrer will not require the same amount of consideration. The second is, that the matters stated in the supplemental bill might have been introduced into the original bill by way of amendment. This is true, no doubt, with regard to some of these matters; but the demurrer is to the whole bill, and therefore if it contains a single fact which is proper to be stated in the supplemental bill, the demurrer must be overruled. Now the recovery of damages of a certain specified amount, is a fact of this nature. It has occurred since the filing of the original bill, and it is a fact which, for the purposes of this argument, we must consider material. This ground of demurrer must therefore be overruled also. The next ground of demurrer is, that it does not appear that the plaintiff has not obtained the benefit of the injunction prayed by the original bill; the meaning of which, we suppose, is, that all the relief to which the plaintiff is entitled, can be obtained by means of the original bill. But one office of a supplemental bill is to

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1850. state matter which has occurred since the filing of the original bill, and which strengthens the title to the relief thereby prayed. Now this is the case with this supplemental bill; for, as we have already observed, it states a fact, having occurred since the filing of the original bill, upon which the decision of the whole case may turn, and therefore comes within the rule we have mentioned. The demurrer, therefore, cannot be supported on this ground. The next ground of demurrer is, that the relief prayed by the supplemental bill is matter for an original, and not a supplemental bill. In one point of view, this is correct; and had the supplemental bill contained nothing but the prayer in question, and the statement of the facts, which in that case must have been considered as made in order to sustain this relief, this demurrer might have been proper; but in another point of view, this demurrer fails; for the supplemental bill stating a fact, which we must consider material to the relief prayed by the original bill, and praying that "the defendant may be enjoined as prayed in the original bill," is to that extent proper, and therefore this demurrer, which applies to the whole bill, must be disallowed. The last ground of demurrer, which is that the supplemental bill has been filed without leave of the court, must share the same fate. This rule applies, as we understand the practice, only to cases where the supplemental bill states, not matter which has occurred since the filing of the original bill, but matter which has occurred before, and come to the knowledge of the plaintiff for the first time when the cause was in such a stage as to preclude amendment. The supplemental bill in this case states matter which occurred after the filing of the original bill; and moreover, such a demurrer is not proper, where the cause is in such a state as to admit of the amendment of the bill. The objection then, is, not that the supplemental bill was filed without leave of the court, but that the matter stated in it is matter of amendment. If the second, third, fourth and fifth grounds of demurrer had stood alone, we should have overruled them with costs; had the first and last stood alone, we should have overruled them, reserving the costs until the hearing, in

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order that if it appeared that the plaintiff had no equity, the defendant might have the benefit of it in respect of these costs. Under the circumstances of the case, however, the most proper and just course will be to overrule all the demurrers, without costs. We have looked at all the cases that were cited, and at some others.

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HARRISON V. BABY.

Injunction—Practice.

When a special injunction is granted staying proceedings at law, the amount claimed in the action at law must be paid into court. April 12.
Exceptions to an answer cannot be shewn as cause against dissolving a special injunction; for if the answer be insufficient, it may still be used as an affidavit.

The plaintiff in this case had bought some shares in a mining company, and, being unable to realize the amount of the purchase money, entered into arrangements with the defendants for rescinding the bargain; but owing to some of the scrip having been lost, in its transmission by mail to the plaintiff by his agent at New York, to whom it had been sent for the purpose of disposing thereof for the plaintiff's benefit, the defendant refused to carry out the agreement, and commenced proceedings in the Queen's Bench, in order to enforce payment of the notes made by plaintiff to the defendants for the amount agreed to be paid. The plaintiff thereupon filed a bill to compel the defendants to carry out this agreement, and upon an affidavit of the facts moved for and obtained a special injunction staying the proceedings.

Statement.

The defendants having put in their answers, gave notice of a motion to dissolve the injunction which had been issued; and the motion now coming on,

Mr. *R. Cooper*, for the defendants, after stating the facts, was proceeding to argue as to the propriety of dissolving the injunction, when he was stopped by the court.

Mr. *Turner*, for the plaintiff.—The defendants are now too late to move to have the injunction dissolved on the ground of irregularity; the bill having been filed in

1850. August last, and the defendants having refrained from putting in an answer until March, a period of seven months.

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The answers put in are clearly insufficient, and exceptions have been filed: on this ground also he submitted the injunction would be sustained, and referred to 2 Mer. 475.

The further facts of the case, and the points relied on by the counsel, appear in the judgment of the court.

Judgment. THE CHANCELLOR.—The plaintiff having purchased from the defendant *Baby* some shares in a mining company, made several promissory notes in his favour to secure the price agreed upon. The plaintiff subsequently became desirous of rescinding this contract, and certain proposals were made for that purpose to *Baby*, in which he acquiesced. Some of the terms of this contract to rescind have been complied with; others, as we are informed, remain as yet unperformed. Some time in the month of August last past the defendants commenced an action in the Court of Queen's Bench, against the plaintiff in this suit, upon such of the promissory notes given by him as had then fallen due; and the writ in that action was served on the eighth day of that month. Upon the seventeenth of the same month, the plaintiff filed his bill in this court, for the purpose of enforcing performance of the agreement to rescind, and praying an injunction to restrain the proceedings at law; and upon an affidavit filed at the same time, moved for, *ex parte*, and obtained, the special injunction which has occasioned this motion.

The order for this injunction provided in no way for the protection of the plaintiff at law, in the event of this suit proving unsuccessful; it neither directed the money to be paid into court, nor required the plaintiff here to confess judgment at law. The answers of the defendants were only filed during the course of the past month, and they now move on those answers that the injunction so granted may be dissolved.

Upon the statement of these facts, the learned counsel for the plaintiff being called upon to sustain the injunction, argued that the present motion must fail—first, because the answers having been excepted to for insufficiency, he

was entitled to show those exceptions for cause. Secondly, that it was not competent to the defendants then to question either the manner in which, or the terms upon which the order of August, 1849, had been made, in consequence of the tardiness exhibited by them in filing their answers. Thirdly, that the order was proper, the action having been only commenced upon the 8th of August, while the assizes in the district where the venue had been laid had been fixed for the 11th of September, a period too short to have allowed the plaintiff to obtain the common injunction. The learned counsel for the defendants expressed their readiness to consent to an order continuing this injunction, upon the payment into court of the money sought to be recovered at law, but the plaintiff declined to accept an order on those terms, although he expressed his readiness to confess judgment in the action.

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Under these circumstances, I have no doubt that this injunction must be dissolved.

The plaintiff is not entitled to shew exceptions for cause in this case. When the motion is to dissolve the common injunction, exceptions are held to be sufficient cause against the motion, because the writ having been issued upon default, and being ordered to continue till answer, the judgment of the master upon the exceptions is the proper medium of ascertaining whether the answer is sufficient, that is in fact, whether an answer has been filed; and consequently prior to his report, there exist no means of determining whether the time during which the writ was to continue has or has not expired. Under such circumstances, therefore, exceptions are necessarily regarded as sufficient cause against the motion to dissolve. But a defendant has always been allowed to move against a special injunction upon affidavit. An answer, in such case, although insufficient, is still in force as an affidavit, and may afford ample ground for the order asked; and therefore exceptions are not regarded as sufficient cause for refusing a motion to dissolve a special injunction (a).

Judgment.

That the order in this case was a departure from the ordinary course of the court, is almost too plain to admit of

(a) *Smith v. Cleasby*, 10 Sim. 91.

1850. doubt. Lord *Cottenham* said, in *Brown v. Newall*, (a)

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“But when an action has regularly proceeded, and is upon the very eve of trial, an *ex parte* injunction to stop it, is an order such as I have not before seen;” and in a still later case, (b) he said, “The rule of the court is a universal rule, that you cannot restrain proceedings at law, except upon the defendant’s default.” Had this case proceeded according to the established practice of the court, the defendants would have been restrained from proceeding at law, not as now by special injunction, but only upon their default by the common injunction, which would have continued in force till answer. It would have been competent to them to have then moved against such injunction, and the plaintiff would have been obliged to meet the application upon the admissions of his equitable rights to be found in the answer. Upon the discussion of such a motion, it would not have been required of the plaintiff to establish conclusively that his equitable title would finally prevail; but he would have been required to lead the court to the conclusion, that a substantial question was presented for discussion—a probable case for relief. To permit the enforcement of the defendants’ legal rights, pending the discussion of an equitable defence evinced, to that extent, would be in many cases equivalent to withholding all equitable relief; and therefore to avoid such an anomaly, this court does interfere by injunction under such circumstances, to preserve things in *statu quo* until the hearing. A probable case is essential in every instance; it is the only foundation upon which the jurisdiction rests. But being laid, other considerations must be attended to, for the purpose of determining the manner and extent to which it may be proper to interfere with the legal proceedings; for if the interference of the court in favour of an equitable defence upon a probable case only, be justifiable in reason, then would it seem to follow *a fortiori* that this court, before it thus interferes, is bound to have within its reach, so far as that may be, the means of giving effect to those legal rights, which although admitted or established, it has enjoined, should the *prima facie* case for equitable relief, upon which it has

(a) 2 M. & C. 570.

(b) *Thorp v. Hughes*, 3 M. & C. 753.

acted, eventually fail. And whatever may be the strength of the equitable case, a defendant at law cannot come here to change the jurisdiction to arrest the progress of an action at law, reserving to himself the right to contest at law those very proceedings which he asks to have arrested. This court may at the hearing enjoin legal proceedings—it may correct the wrong done by judgment at law—but to arrest by *interlocutory* injunction the assertion of a legal right in behalf of one who comes denying the existence of such right, and reserving to himself the privilege of contesting its validity in the courts of law, would be repugnant to reason and justice. When a defendant at law comes to this court, his defence is either wholly at law or wholly in equity, or partly at law and partly at equity. It is unnecessary to speak of the first class of cases; in them the defendant comes here for discovery. The motion is in effect a motion to stay trial, for the purpose of obtaining material evidence, although made here, because this court alone possesses jurisdiction to afford the required discovery. Such an application affords no analogy for the present proceeding.


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Judgment.

Where the defence is partly at law and partly in equity, a plaintiff shewing cause against dissolving the common injunction, must in the first place relinquish his legal defence. He cannot change the jurisdiction; reserving to himself the power of contesting the defendant's rights at law, should his equitable case fail. In *Barnard v. Wallis*,^(a) Lord *Cottenham* overruled the judgment of Lord *Langdale*, upon a motion to dissolve the common injunction in a case of that kind. His lordship said: "I apprehend, however, that it is the course of the court, where the question depends partly on a legal title and partly on an equity, which will arise only in the event of that title being decided in one way, either to require that the party applying to the court for its interposition should admit the legal right of the other party, as in the case of giving judgment in ejectment, which is the common instance, or, if circumstances are not such as to enable him to do that, then to allow the action to go on, in order that the legal rights of the parties may be first

(a) Cr. & P. 85.

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ascertained, and that he may then come to this court to apply those legal rights. This I apprehend to be the regular course of proceeding, and it is a very wholesome practice. It occasions no loss of time; and it has, moreover, this good effect in a case like the present, where the plaintiff in equity is in possession of the easement in dispute, that if the parties come back to this court after the trial at law, I shall then know what amount of damages has been assessed, and shall have an opportunity of securing in court that which at law shall have been decided to be a full compensation for the easement; whereas at present, I have no means of fixing upon any sum to be paid into court.” (a)

Judgment.

Reason, therefore, and authority, alike require an admission of the legal right, as an indispensable preliminary to continuing the common injunction. But they require more. Were this court to content itself with merely exacting an abandonment of the defence at law, great injustice might be the consequence. At the hearing, the plaintiff might altogether fail to establish his case; and thus legal process may have been arrested at the only period when it would have proved available. Justice, therefore, requires this further condition, that the plaintiffs, who seek protection by having the common injunction continued to the hearing, shall put it in the power of the court to do justice eventually to those whose legal remedies are stayed, should they at the hearing fail to establish their equity. Should the nature of the case render it difficult to attain this object satisfactorily, the court hesitates to enjoin. But where the matter admits of easy adjustment, as in ejectment by confession of judgment, or where the cause of action consists of a liquidated money demand, by payment into court, the practice is now well settled. In *Sanxter v. Foster*, (b) Lord Cottenham said: “The court ought not to interfere for the purpose of preventing a party from enforcing a legal claim, without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the court had not interfered. By making a prospective order like the present, the court could not determine what

(a) *Playfair v. Birmingham Grand Junction Railway Co.* 9 L.J.N.S. 253.

(b) C. & P. 302.

security it ought to require the plaintiff to give as the condition of his obtaining the injunction, so as to enable the court to do justice to the defendant in the event of the plaintiff failing to make out his case at the hearing." And in a still later case, where the action at law was for the recovery of a money demand, and the plaintiffs in equity opposed the motion to dissolve the common injunction upon the answer, the same learned judge observed: (a) "In all those cases where the property exists in the shape of money, the court is bound, as it interferes with the claim of the party who is asserting a legal right to it, to take care that the property shall be put in a safe place of deposit, in order to abide the ultimate decision of the court;" and further on, "Under these circumstances, I do not feel myself at all at liberty to entertain any question as to whether the money is or is not safe where it is. I have no doubt personally, that it is perfectly safe where it is, but I cannot exercise the jurisdiction of the court on any such ground; and therefore, if it is required on the part of the assignees that the money should be paid into court, it is a matter quite of course that the money to which they are *prima facie* entitled, and the legal title to which I prevent them from ascertaining by continuing the injunction, should be secured in court for the purpose of abiding the ultimate result of the question between the parties."

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Where the defence is wholly at equity, no question can arise respecting the propriety of requiring an admission of the plaintiff's legal rights. Upon our hypothesis, the plaintiff in equity admits those rights, and confesses that he is unable to protect himself at law. There is no legal defence to be abandoned, but the remaining observations made in respect to the last class of cases apply with increased force to this. Indeed, several of the authorities cited were cases where the defence was exclusively at equity; all strongly apply, and are of the highest authority, because, irrespective of the great learning of the eminent judge who determined them, they were all decided upon appeal from either the Vice-Chancellor of England or the Master of the Rolls, and seem to me to place the practice in regard to continuing

(a) Meux v. Smith, 7 Jurist 821.

1850. the common injunction upon a wholesome and satisfactory footing.

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Cases may arise, however, in which, either from the nature of the transaction or the peculiar practice of the court, the proceedings in which are sought to be enjoined, and the prompt action of the defendant, the plaintiff in equity may not be able to obtain the common injunction, and consequently may have no opportunity of asking that it be continued to the hearing. In such cases, however, there is no defect of jurisdiction. The plaintiff, on bringing himself within the exceptions, is permitted *ex necessitate* to move for a special injunction. But it is obvious that all those conditions, imposed by the court, when it is asked to extend the common injunction, ought also to be imposed, where this peculiar special injunction is granted. The court, when it interferes in this peculiar way, requires to be placed in a position in which it can do justice, in case the plaintiff in equity should fail at the hearing, quite as much as when it is asked to continue the common injunction. There can be no reason why a plaintiff, who is permitted *ex gratia* to make a special application, should be exempted from the conditions imposed upon those who apply in the ordinary course of the court; neither would it be consistent with justice to deprive a defendant, who has observed the rules of practice, (and so furnished no occasion for the common injunction), of that protection which would have been afforded him had he been guilty of default. It is plain that this peculiar jurisdiction can be safely administered only under the restrictions considered necessary when the common injunction is to be extended. Had this case then proceeded according to the settled practice, had the common injunction issued, and were the plaintiff now shewing cause upon the answer, it is quite clear (assuming him to have a strong case for equitable relief, admitted by the answer) that the injunction would only have been continued upon payment into court of the amount sought to be recovered at law. It is equally plain that this special injunction should only have been issued upon the same terms. And now, without determining any thing as to the regularity of the original order, (although I see no ground upon which it

is to be sustained,) and without determining whether the defendants are now precluded from urging that objection in consequence of delay, (although my opinion on that point is also unfavourable to the plaintiff,) still it is obvious that we could only continue this injunction upon payment into court of the amount claimed. Its continuance upon those terms is assented to by the defendants, which would have precluded the necessity of considering the application on the merits. The learned counsel for the plaintiff, however, declines to accept a conditional order. I am therefore of opinion that the injunction must be dissolved with costs.

JAMESON, V. C., concurred.

ESTEN, V. C.—In this case a special injunction was granted, staying proceedings at law. I could not collect from the argument at the bar the ground upon which this departure from the ordinary practice was made. The amount in dispute was not secured for the benefit of the party whose proceedings were stayed; but no doubt when the injunction was granted, the case appeared to warrant the course which was adopted. The defendant, instead of applying promptly to discharge this injunction for irregularity, if he complained of it on that ground, in which case the plaintiff might have proceeded regularly to obtain the common injunction, remained perfectly inactive for seven months, and then on the eve of the trial put in his answer, and moved to dissolve the injunction, relying as his first ground on the irregularity of granting a special injunction. Under such circumstances, I much doubt whether, after such a long delay, a defendant ought to be permitted to avail himself of such a ground; but without deciding this point, and supposing the injunction to have been in the regular form, staying only execution, and the defendant to be applying in the ordinary way to dissolve it, as it could be continued under the circumstances of this case only on the terms of depositing the money in court; and as the defendants expressed their willingness to consent to such an order, it became unnecessary to enter into a consideration of the merits of the case. With respect to the terms on which it is proper to continue the injunction, under such circumstances, it should be remarked, that when the com-

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mon injunction is continued on the merits confessed in the answer, it does not as when first issued stay only execution, but all proceedings whatsoever; and therefore where the defendant applies to dissolve it before he has obtained judgment, if it is continued on the merits confessed in the answer, he is prevented from obtaining judgment at all until the decision of the suit in equity; and therefore every consideration of reason and justice seems to require, that unless perhaps the plaintiff is entitled to a decree upon the answer, the amount in dispute should be secured in the mean time. It is true that Sir *John Leach*, in the case of *Wynne v. Griffith*, (a) adopted a different course; and that Lord *Cottenham*, in a subsequent case, in which the Vice-Chancellor of England had acted in a similar manner, although he reversed his order, intimated that a case might possibly exist in which it would be proper to grant it; but the rule of securing the amount in dispute pending the suit in equity, where proceedings at law are stayed by continuing the common injunction upon the merits confessed in the answer, has been followed by Lord *Cottenham* in such a variety of cases, and seems in itself so reasonable and just, that I do not think we should be warranted in departing from it in the present state of the authorities on the subject; and therefore I am of opinion, that whenever a defendant applies to dissolve the common injunction upon the answer, if the court is of opinion that sufficient merits are confessed to warrant its continuance, that relief should be granted only on the terms of depositing the amount in dispute in court to abide the decision of the suit in equity. If any departure is under any circumstances to be made from this rule, it can be only in a case free from all doubt, and in which the cause could be heard on bill and answer, and if it were so heard a decree would be pronounced in favour of the plaintiff.

Mr. *Turner* asked, that the costs of dissolving the injunction might be costs in the cause; and it appearing that the parties had effected an arrangement out of court, the order, as finally directed to be drawn up, made the costs of the motion costs in the cause.

(a) 1 S. & S. 147.

IN APPEAL.

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[*Before the Hon. the Chief Justice of the Queen's Bench, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice McLean, the Hon. Mr. Justice Draper, the Hon. Mr. Vice-Chancellor Esten, and the Hon. Mr. Justice Burns.*]

20th March
& 3rd April.

ON AN APPEAL FROM AN ORDER OF THE COURT OF CHANCERY.

HAWKINS V. JARVIS.

Practice—Pro confesso—75th Order.

Held per Cur. (ESTEN, V. C., *dissentiente*) that the practice hitherto pursued in the Court of Chancery of confirming the master's report, where the account has been taken *ex parte* and without notice to the defendant, is irregular; and that the court was right in refusing to confirm the report, notwithstanding that had been the practice ever since the order in question was made.

In this case the same question arose as had occurred in the case of *Buchanan v. Tiffany* (reported ante p. 98.)

Mr. *Mowat*, for the appellant, urged the same reasons to the court as he had done in the argument of that case.

Mr. *Vankoughnet*, for the respondent, relied upon the grounds stated in the judgment of the court below in *Buchanan v. Tiffany*, as sufficient to sustain the order now appealed from.

ROBINSON, C. J.—Plaintiff, on the 11th August, 1848, filed his bill to foreclose.

Defendant, being served with subpœna within the jurisdiction, did not appear, and plaintiff entered an appearance for him under the 75th order of the Court of Chancery, and the defendant not having answered the bill within the time limited by the notice endorsed on the subpœna, the bill was ordered to be taken *pro confesso*, and decree made (on 13th March, 1849) that a certain judgment mentioned in the bill was a lien upon the mortgaged premises, and the usual order should go to the master to take an account of the sums due on the mortgage, and on the judgment, with interest, &c., and that plaintiff should redeem within twelve months, or be foreclosed.

On the 24th August, 1849, the master's report was brought up, in which he states that, in pursuance of the decree of 13th March, 1849, he had been attended by the solicitor

1850. for the plaintiff, the defendant not having appeared to or answered the plaintiff's bill, and the same having been taken *pro confesso* against him by his default; that he found £83 18s. due upon the mortgage, and £116 16s. 1d., due upon the judgment, for principal and interest, including costs and the costs of writs of execution, and computing interest for the period of twelve months given for redemption; and taxing the costs of the suit to foreclose at £15 8s. 8d., he appointed the whole to be paid as mentioned in the report.

On 30th November, 1849, plaintiff's counsel moved for an order to confirm the report; but as it appeared upon the report, that no notice of the proceedings in the master's office had been served upon the defendant, and that the account had been taken in his absence, the defendant not having appeared to or answered the plaintiff's bill, which had therefore been taken *pro confesso* against him, and such being admitted by counsel to have been the fact, the court refused to confirm the report, considering the proceeding *ex parte* under such circumstances irregular; and they ordered that it should be referred back to the master, to proceed *de novo* upon the decree, and that notice of the proceedings to be had before him should be served upon the defendant or his solicitor.

This course, it appears, was taken by the court, in accordance with what they had recently determined in a similar case of *Buchanan v. Tiffany*, and in three other cases, which are all reported in 1 Grant's Chancery Rep. 98, 105.

The order made in this case has been appealed from. The plaintiff contends that the proceedings *ex parte* before the master, without service upon the defendant of any notice of such proceeding, was warranted by the 75th order, and was not irregular; and that at all events, if it should be thought that the terms of the 75th order did not, upon a proper construction, admit it, still that the practice had been invariably such under that order, from the time of its passing in 1840; that the practice of the court, constantly maintained for so long a time, has become the law of the court, and ought to be upheld as to all past proceedings for

the security of parties, and to prevent inconvenience which may follow if these should be all held to be irregular, although the court may think proper to provide against the further continuance of such a practice by a general order. 1850.

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I suppose it is an apprehension of some inconvenience in other cases, in which reports made under such circumstances have been acted upon, that has led to this appeal; for otherwise the question, being one merely of practice, and the effect only being to secure to the defendant an opportunity of being heard before an account is finally taken against him, which opportunity it is manifestly fit he should have, it would be very undesirable to make such an order the subject of appeal.

It seems to be admitted that the practice, when the bill has been ordered to be taken *pro confesso* against the defendant upon his default, has been such as was adopted in the present case; and this in mortgage cases, and as well since the orders made in 1845 for regulating the practice, called the mortgage orders, (and commencing at 166 of the series,) as before. It must have been by inadvertence, I think, that such an effect was given to the 75th order, in the first instance, for there certainly is nothing in the language of the order itself that seems to sanction so essential a departure from the general principles of practice. It merely provides that in case of the defendant's failing to answer within the time limited, after being served with the subpoena, the bill may be ordered to be taken *pro confesso*, and a decree made *and enforced against him accordingly*. And in order that he may be aware that this course will be taken, the notice required to be endorsed on the subpoena states— if he does not answer within the time limited, he will be considered as confessing the matter alleged in the bill, and that a decree will be made and enforced against him.

Judgment.

There seems nothing here to relieve the plaintiff from the necessity of enforcing the decree according to the general practice, giving the defendant, who has been served and is within the jurisdiction of the court, notice of ulterior proceedings before the master, wherever such notice is proper.

1850. Though the defendant is to be taken to have confessed the bill, yet, when an account is to be taken before the master, he may have many things to urge and to contend for which are still open to him, notwithstanding his admission of the bill. The practice and the reasons of it, in England, are very clearly stated in the case of *King v. Bryant*, (a) referred to in the judgment given in the case of *Buchanan v. Tiffany*.

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Jarvis. And after the making of the mortgage orders, in 1845, it would have seemed, I think, to follow as a proper consequence, that whatever practice might have crept in under the 75th order of 1840, the defendant should at least have had the advantage of whatever notices the practice laid down by those orders seemed intended to secure to him. They were made for simplifying proceedings and reducing expense, by dispensing with whatever it seemed could be safely dispensed with, and yet it is very clear that those orders do not contemplate the taking the account before the master of the money due upon the mortgage *ex parte*, and without notice to the defendant. They do not exact notice or any new and additional protection to the defendant, which the former practice denied to him; they are so framed merely as to shew clearly that they were not intended to go the length of dispensing with the service of any warrant after default.

Judgment. It is alleged that no inconvenience or injustice has been found to have occurred in proceeding as the plaintiff is stated to have done in this case, though the cases have been numerous. That may be. The mortgagee in general, no doubt, is not inclined to act dishonestly, and he would think it scarcely worth his while at any rate to conceal the fact of a payment which he would naturally suppose would be allowed, and the injustice corrected as soon as the truth came to be known; and then it is given as a reason why there has been found no danger in the practice, that whenever the master sees any reason for it, it has been usual for him not to proceed till notice has been given to the defendant.

(a) 3 M. & C. 191.

But the only effect, after all, of what the court has done by the order appealed from, is to extend to the defendant the same protection which the master, it is admitted, has done whenever he thought he saw occasion for it. And apart from any consideration of what the general practice requires, that might well be thought to be the prudent course in this case, when the court had decreed that a certain judgment of the plaintiff against the defendant formed also a lien upon the land, in addition to the mortgage. The defendant might, for all we know, desire to contend that the judgment and the mortgage were not wholly for independent debts; and if they were, yet the payments which may have been made on account of the judgment were matters of which the mortgage, and any receipts endorsed on it, would afford no evidence.

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I have read what was said by his lordship the Chancellor, in giving judgment in the case I have referred to, and fully concur in it.

We might perhaps look on this case differently, if the parties were before us on an appeal from an order setting aside a proceeding which had been taken according to the practice now held to be irregular. Judgment.

We might then be properly called on to consider the possible effect of treating as irregular all that had been done according to a practice of many years, known to and upheld by the court.

But here our attention is otherwise called to the alleged irregularity of practice. The defendant, being yet in time, says this report ought not to be confirmed, because I have not been heard; or rather the court, in his absence, feels it right to say that for him, and to require, that before the matter is concluded, he shall have that opportunity which clearly is in accordance with natural justice.

If we were to reverse on appeal the order which has been made in this case, we should be insisting that the defendant shall not have that just opportunity of defence, but that the irregular practice shall prevail; and that because it has been applied in regard to others, it shall be applied to him.

1850. The maxim is, rather that a faulty practice is to be as soon as possible reformed.

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If on account of this order having been made, referring the matter back to the master, it shall be attempted to unsettle cases where the report made, as this was, has been confirmed, and as it seems irregularly, then a different question will be presented; and it is evident from what is said by the Court of Chancery, in *Buchanan v. Tiffany*, that the weight due to former general practice, and the fact of laches and acquiescence on the part of the defendant, will in any such case receive due consideration.

We are of opinion that this appeal should be dismissed with costs.

ESTEN, V. C.—The subject presented by this appeal for consideration, seems to resolve itself into three parts:

1st. The meaning of the 75th order.

2nd. The effect of a continued practice, supposing the meaning to be doubtful.

Judgment 3rd. The effect of the practice, supposing the order, according to its true construction, to require service of warrants.

To determine the first question, we must consider the effect of the order upon the progress of suits—1st, before decree; 2nd, after decree. Supposing the order to require no service before decree but that of the subpœna, no doubt considerable facility was afforded by it in that stage of the suit. Where a defendant did not appear, instead of issuing an attachment to compel him to appear against his will the plaintiff could enter an appearance for him; and if he did not answer, instead of resorting to the like process, the plaintiff could have the bill taken *pro confesso*, and a decree made against him; and in those cases in which a defendant would not answer, the plaintiff was relieved from the necessity of travelling through all the process of contempt, (which, although shortened, was burdensome,) in order to have the bill taken *pro confesso*. These last mentioned cases, however, were not in the proportion of one in a hundred, and therefore I think too much stress has been laid upon the assistance afforded by the order in this

respect. Where the decree was final in its nature, much benefit was derived from the order, and it could be productive of no inconvenience to the plaintiff; but in that numerous class of cases in which the decree was followed by a reference and an account, the whole effect of the order, in facilitating proceedings, depended upon its not requiring service of warrants. If service of warrants was not required, the order continued to operate beneficially to the plaintiff; but if it did not dispense with service of warrants, not only did it not facilitate proceedings, but it rendered them incalculably more difficult and tedious than they were before; for a plaintiff proceeding under the old practice, and having without any very great trouble or expense compelled an appearance, had, when he reached the master's office, a solicitor upon whom to effect service; while, if he proceeded under the order, he arrived in the master's office indeed very easily, but, when there, his difficulties were infinitely greater than if he had not proceeded under the order at all; for, having no solicitor upon whom to effect service, he was driven to personal service in every instance; which, occurring upon an average every three or four days, would, in the case of a defendant residing at any distance from Toronto, have been attended with such intolerable inconvenience, and indeed have been so perfectly impracticable, that I am convinced that if such had been understood to be the true construction of the order, not a single case, involving a reference to the master, would have been prosecuted under it; and if any plaintiff had been so unlucky as to have proceeded under it, he would, if it had been in his power, when he reached the master's office, have abandoned proceedings altogether, and commenced the suit *de novo*. In truth, if such were the true construction of the order, it was of little value, except in cases not involving an account; for the proceedings prior to decree were comparatively simple and easy; and it cannot be doubted that in every case involving an account, if a plaintiff had had his choice to proceed under the order with service of warrants, or to proceed under the old practice, he would have chosen the latter alternative. It has been suggested, however, that

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1850. the master could dispense with the service of warrants. I am not aware that the master has any such power. There is one warrant, which is of a discretionary nature, namely, the warrant to consider the decree. Some decrees are of such a description, presenting upon the face of them so plain a course of proceeding, as not to require this warrant; but I am not aware of any other warrant of which the master can dispense with service. It is true, an application might have been made to the court for that purpose; but in this case, the practice would not have been simplified or facilitated by the 75th order, (which would indeed, according to this construction, have rendered it more difficult,) but by another order in aid of it. In fact, every body, when he considers the course of practice in the master's office, will admit that the 75th order cannot possibly have meant that service should have been had of the usual series of warrants. It must have contemplated either a partial or limited service, as of one warrant, or no service at all.

Judgment. Now, if it had meant a partial or limited service, it would have expressly provided for it; because, in the absence of any such provision, supposing it not to dispense with service altogether, service of the whole series must necessarily have followed. As, therefore, it contains no express provision on the point, one is necessarily driven to the conclusion that it did not contemplate any service whatever. Why should the 75th order require service of warrants, more than notice of motion, to take the bill *pro confesso*? Every body will allow that this is a motion of such a nature as to require notice, unless it is dispensed with; but how is it dispensed with by the 75th order, except on the principle that it intended all proceedings under it to be *ex parte*? The endorsement on the subpoena affords quite as distinct and plain notice of proceedings in the master's office, in stating that the decree will be enforced against the party, as it does of the motion that the cause shall be set down to be heard, and that the registrar shall attend with the record of the bill, in order to its being taken *pro professo*; of which precise proceeding, or the time when it will take place, certainly no distinct intimation is discover-

able in the endorsement in question. When we attend to the state of the practice at the time this order was promulgated, it is not difficult, I think, to discover its true meaning. All the orders of the Court of Chancery in this province were adopted with more or less reference to similar orders existing in England, but upon a principle of simplification and acceleration, in order to accommodate them to the circumstances of this country. I think this order was borrowed from the practice which prevailed in England at the time of its promulgation, under two statutes passed in the 1st and 3rd and 4th years of the late King, (the former statute re-enacting the principal provisions of the 5th Geo. II., ch. 25,) with respect to absconding and absent defendants. When a defendant absconded, either by withdrawing from the realm or by being concealed within it, divers advertisements were published; and if he did not appear, the bill was taken *pro confesso*. In this case, if the decree directed an account, the proceedings in the master's office were all *ex parte*; and the reason assigned in the books for this practice was, that there was no party, solicitor, or clerk in court upon whom service could be effected. Defendants residing in foreign parts were required to be personally served with a subpoena; and if they did not appear, an appearance was entered for them; and it is expressly provided by the act, that the same proceedings may be had upon such an appearance, as if it had been entered by the defendant himself in the usual manner. Such was the state of the practice in cases of this description, when the 75th order was issued in this province; and it seems to me that it was thought very desirable to apply a combination of these two modes of proceeding to a totally different class of defendants from that affected by the English acts, namely, defendants residing within the jurisdiction, and upon whom, therefore, service could easily be effected, but who would not care to appear to or defend the suit; and that, too, upon the principle of simplification and acceleration before-mentioned. Therefore the order required personal service, because the defendant was at hand, and the endorsement on the subpoena gave him full notice of the whole course of the

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suit from the beginning to the end. If he did not appear, the bill was not taken *pro confesso*, as against absconding defendants, but an appearance was entered for him as for defendants residing in foreign parts; but instead of providing, like the English act, that the same proceedings should be had upon an appearance so entered, as if it were entered by the party himself, the order directed that if the defendant should not answer, the bill should be taken *pro confesso*—intending, as I conceive, to place a defendant who, after service of a subpoena conveying a distinct intimation of every thing that would be done against him, did not choose to appear to or defend the suit, and who thereby deprived the plaintiff of the presence of a solicitor upon whom service could be effected, in the same situation as absconding defendants under the English acts before mentioned, and for the same reason; for it is obvious that an appearance entered for a party is merely nominal; it produces none of the practical effects of an appearance; and it is for want of appearance, as well as of answer, that the bill is taken *pro confesso* under the 75th order; for it has been decided, that if a defendant enters an appearance himself, the bill cannot be taken *pro confesso* against him under this order. I think, therefore, the master was quite right, when he followed the practice under 1 & 2 Wm. IV., ch. 36, against absconding defendants. In pronouncing my judgment in the court below, in the three cases in which I differed from the rest of the court, I was content to consider the construction of the order doubtful: but I confess that subsequent reflection has removed all doubt from my mind as to the true meaning of this order, and that it seems to me clear that it meant that all proceedings under it should be *ex parte*, if the defendant did not appear after decree as well as before; and therefore that the plaintiff in this case is entitled to an absolute order for the confirmation of the master's report, and the order of the court below should be reversed. I may add, that I fully understand that the order was made in the present case in conformity with the general rule, and not as an exercise of discretion in this particular instance. It was upon this supposition that I concurred

in the order, considering myself bound by the determination of the court in the three cases to which I have alluded; and upon any other principle I should not have concurred, for certainly no special circumstances existed in this case to warrant a departure from the general practice.

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But supposing the construction of the 75th order to be doubtful—and it is impossible, I think, to place the case upon higher ground than that—I confess it did appear to me that a sound judicial discretion pointed to an adherence to a construction established by a continued practice of ten years, rather than to the adoption of a different construction not imperatively called for, and the adoption of which would have the effect of shaking and unsettling a multitude of causes, settled and resting upon the usual course of practice. And I may remark that there never was a case in which the course of practice could be appealed to with more safety than this; for the order in question was, I believe, drawn up by Mr. *Hepburn*, the then registrar, no doubt on consultation with the principal practitioners in the court, who were the very persons by whom it was immediately carried into practice, and who, with full knowledge of the actual intention of the framers of the order, did in fact put it in execution uniformly and undeviatingly from the moment of its publication by proceeding *ex parte* in the master's office in every case in which the defendant did not intimate a desire to be heard.

Judgment.

I should be prepared, however, I think, if it were necessary, to go a step farther, and to hold that, if the 75th order had in express terms required service of warrants, the continued and uniform practice which has taken place under it, would have had the effect of abrogating and varying this provision, and of establishing a contrary practice. Supposing in this case another order had been issued, reciting that service of warrants had been found in practice inconvenient and injurious in cases where the defendant had not appeared, and dispensing with it in future, no doubt such an order would have been valid and effectual; and I should, I think, consider the uniform practice which has taken place under this order, equivalent to an express order to

1850. that effect upon the authority of the cases of *Bochem v. De Tastet*, and *Brown v. Bruce*, which were cited in the argument upon this question in the court below.

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Per cur.—Appeal dismissed, with costs.

ESTEN, V. C., *dissentiente*.

McLELLAN V. MAITLAND.

Practice—*Examination of a defendant as a witness.*

Held, per cur.—Blake, C., *dissentiente*—that where a plaintiff examines a defendant, whose interest in the suit is such that a decree for the plaintiff must necessarily also operate for the benefit of such defendant, such examination does not disentitle the plaintiff to relief against the other defendants.

This cause came on for hearing upon the pleadings and evidence. Upon the opening of the pleadings, several preliminary objections were taken on the part of the defendants; of these the only one on which the court upon this occasion gave judgment, was that the plaintiff, having examined *Owen McDougall*, one of the defendants, as a witness, the bill must be dismissed with costs, as against all the defendants; and for this proposition, the following cases were cited: *Nightingale v. Dodd*, (a) *Bernal v. Marquis of Donegal*, (b) *Champion v. Champion*, (c) *Attorney-General v. Dew*, (d) *Massy v. Massy*, (e) *Goold v. O'Keeffe*. (f)

Statement.

The defendant *McDougall* did not appear at the hearing.

Mr. *Brough*, Mr. *Mowat*, and Mr. *Morphy*, appeared for the other defendants.

Mr. *Eccles* and Mr. *Turner*, for the plaintiff, cited *Smith v. Smith*. (g)

THE CHANCELLOR.—The plaintiff carried on business in this province as general merchant so far back as the year 1817, in copartnership with *McDougall*, one of the defendants. The defendants *Auldjo* and *Maitland*, together with one *Garden* since deceased, also carried on business at the same period, as copartners at Montreal, in the then

(a) 2 Amb. 583.
(d) 13 Jur. 1066.

(b) 3 Dow. 133.
(e) Beat. 353.
(g) 6 Hare, 524.

(c) 15 Sim. 101.
(f) Beat. 356.

province of Lower Canada. The dealings between these firms resulted in a debt becoming due from the plaintiff and his co-partner to the Montreal house of about £1700, to secure which certain tenements, situate at Kingston and Belleville, and in the township of Camden, were conveyed by the debtors to the several persons then composing the Montreal firm in fee simple, with a proviso for redemption. The affairs of the Montreal house became involved about the year 1826, and it was then determined to assign the effects of the partnership for the benefit of creditors to three trustees, of whom the defendant *Leslie* is the survivor. It was subsequently deemed expedient that a separate transfer of these mortgage securities should be executed, (whether because the former conveyance was considered imperfect, or for what other reason we have not been informed,) and accordingly in the year 1830, an indenture was executed, by which the defendants *Auldjo* and *Maitland* (*Garden* being then dead) conveyed the several tenements comprised in the original mortgage to the trustees appointed by the deed of 1826, who subsequently, in pursuance, as they supposed, of the trust deed, conveyed them absolutely in fee simple to various purchasers. This bill is filed by the plaintiff alone against the surviving partners in the Montreal house, the surviving trustee under the deed of 1826, and against *McDougall* the co-partner and co-mortgagor of the plaintiff, claiming to redeem, not the entire mortgage premises, but certain specific portions, and as to the residue peculiar relief founded upon the conditional nature of the original conveyance and the subsequent unauthorised dealings of the trustees. It represents, that either the original mortgagees, or these trustees, have conveyed all the mortgage lands absolutely to various purchasers at prices greatly below the actual value. And the sale of the Kingston property is alleged to have been accompanied with this peculiarity, that the vendors, availing themselves of the imbecility of mind with which *McDougall* is said to have been visited, fraudulently induced him to join in that sale, or to release the equity of redemption therein. The bill further alleges, that an account had been presented to the plaintiff shortly

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1850. before the institution of this suit, by either the surviving partners or their trustees, which, after crediting the amount actually realised from the mortgage premises, claimed a large sum as still due, and that an action had been commenced for the recovery of this balance. It represents these proceedings as carried on by the plaintiff at law in collusion with *McDougall*, who is said to have been indemnified from the consequences of that action, the plaintiff having undertaken to levy the amount recovered from the property of *McLellan*; and the bill moreover charges that *McDougall*, in furtherance of those designs, withholds the papers and accounts necessary for the defence of the action at law, and their production is asked.

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Judgment.

The case made by the bill is to the effect I have described, although much of the statement is indistinct, rendering it difficult to ascertain the accurate state of facts. The plaintiff, so far as I can gather, seems to have had but an imperfect knowledge of his own case when he directed the filing of the bill, and the defects growing out of that ignorance do not seem to have been rectified at any subsequent stage of the proceedings. It is said, for instance, that the plaintiff and *McDougall*, as such partners, were seised of divers lands, and amongst the rest of the premises in the cause, the precise meaning intended to have been conveyed by the allegation is not very apparent. We are neither informed when these lands were purchased, from what funds the purchase moneys were paid, or how they were used. I find from the answers of *Auldjo* and *McDougall*, that the legal title of the Kingston and Belleville tenements was in *McDougall*; but that is not stated by the bill, and we have no where been informed of the position of the partnership affairs at the time the suit was instituted. I find in the bill an allegation that the trusts of the deed of 1826 have been determined, and that the residue of the trust property has become vested in the trustees for the benefit of the defendant *Auldjo*, but how that has been effected, and whether in a way to allow of the prosecution of the suit, without the representatives of the deceased partners and trustees, does not appear. I think, however, that the general features of

the case are such as I have described; and that the case has been sufficiently developed to enable me to decide at least one of the objections raised.

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The prayer of the bill is, "That the said *McDougall* and plaintiff may be declared entitled, from the said *Maitland* and *Auldjo* or *Leslie*, or some or one of them, to the full value of the premises, in Kingston, and interest thereon from the time of the appropriation mentioned, or of the sale to *Ritter*; and of the full value of the premises in the township of Camden, with interest as in respect to Kingston. And that an account may be taken of the rents and profits of the premises at Belleville, received by *Maitland*, *Garden* and *Auldjo*, or by the trustees, or any of them, or any other person or persons by their order, or for their use or through their means, or which without their default might have been received." The bill prays a similar account in regard to the Kingston and Camden lands, and then proceeds, "and that the aforesaid value, interest, rents and profits, and also the price or consideration of the said part or share of the capital stock of the said steamboat, and the said sum of money credited to *McDougall* and plaintiff, and interest thereon respectively, from the respective times when the same respectively ought to be credited, may be set against the claim of *Maitland* and *Auldjo*, and that the same may be declared to be satisfied; and that the said *Maitland* and *Auldjo*, and each of them, may be restrained by order and injunction of this court from prosecuting the said action, or any other action, against the said *McDougall* and plaintiff, or either of them, touching any of the matters aforesaid; and that they, or the said *Leslie*, some or one of them, may be decreed to pay to plaintiffs and *McDougall* what upon the balance may appear to be due, plaintiff being ready and willing, and offering to pay to *Maitland* and *Auldjo*, or *Leslie*, what may appear due from plaintiffs and *McDougall*; and that *Maitland* and *Auldjo* or *Leslie*, be ordered to pay to *Elmer* a proportionate part of the said mortgage debt and interest, and that *Elmer* may re-convey the premises in Belleville to *McDougall* and plaintiff, and their heirs; or that *Maitland* and *Auldjo* may

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1850. *McLellan v. Maitland.* be decreed to pay to *McDougall* and plaintiff the utmost value whereof the said last mentioned premises have been since the aforesaid sale thereof to the said *Sampson*; and that the release or conveyance executed by the said *McDougall* may be declared fraudulent and void against the plaintiff; or that the said *Maitland* and *Auldjo* and *Leslie* may be declared to have exonerated plaintiff from a portion of the said debt and interest, equal to one moiety of the real value of the premises in Kingston, and interest thereon from the time of sale; and that the said *McDougall* may produce and deliver to the plaintiff the said books, papers and writings, retained by him in his possession, as in the bill mentioned."

Upon opening this cause, an objection was taken for want of parties, which cannot, I think, be disposed of without investigation into the facts of the case; but a further objection in point of form was also urged. It was argued that the plaintiff, having examined his co-partner, the defendant *McDougall*, as a witness, had thereby precluded the court from making any decree in his favour, and that the bill must therefore be dismissed with costs.

Upon the best consideration I have been able to give the subject, I find myself reluctantly brought to the conclusion that this objection must prevail, and that the course pursued by the plaintiff leaves us no alternative but to dismiss this bill. I say I have been brought to this conclusion reluctantly, because I cannot but regret that this expensive litigation should not have led to a different result; and because the question which we are called upon to decide, depending partly on reason and partly on positive usage, is one of a class upon which a judge sitting here, without any opportunity of consulting the records of the courts in which the practice has grown up, and deprived of the information to be derived from the officers of those courts, with whom rests much that is necessary to a satisfactory decision, to be found neither in the records nor in the reports, the question, I say, is one of a class upon which a judge sitting here must feel himself peculiarly liable to err; and because we are about to introduce a practice which must have the effect to

some extent at least, of varying the rule. But this case comes before us upon the present practice. The parties call for the application of whatever rule has been settled by decided cases. And conceiving, as I do, that this objection has the sanction of authority, I feel bound to give effect to it, because I am convinced that, did judges feel themselves at liberty to decide according to their individual opinion as to the expediency or in expediency of the rules of practice, the uncertainty then introduced would be found to be an evil greater than would result from almost any settled rule.

The practice is in some points sufficiently defined. At law, the parties in whom the right of action is vested must appear upon the record as plaintiffs. A co-plaintiff cannot be examined as a witness; but should a party be made defendant against whom at the trial no evidence is adduced, such party may be examined as a witness by a co-defendant—not by the plaintiff, however, because he has chosen to make him a party to the suit. Here, too, the rule is a positive one, that a co-plaintiff cannot be examined as a witness; (a) but the necessary parties may be brought before the court either as plaintiffs or defendants; such as will not consent to become plaintiffs may be made defendants; and the policy of this court, which, to secure finality, obliges plaintiffs to introduce many persons as parties, some of whom have no actual interest, (as trustees,) and others who, though interested in some parts of the case, may be as to other parts wholly disinterested, renders it obviously necessary that a power should exist of letting in the evidence of defendants in favour as well of co-defendants as of plaintiffs, otherwise the most important testimony would at times be excluded. The order for this purpose in favour of a plaintiff (with which alone we are now concerned) is of course; but it issues upon the suggestion that the defendant has no interest, and is always liable to just exceptions. It follows that a defendant whose answer has been replied to, cannot be examined as a witness, because the replication denies the truth of the whole answer; and so long as it continues

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(a) Fisher v. Fisher, 2 Phil. 236.

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upon the files, the plaintiff will not be heard to say that the defendant is not concerned and interested. (a) Where, however, no replication has been filed, or where it has been taken off the file, a defendant may be examined as to points in which he has no interest, and yet a decree may be made against him upon other points, on the statements in his answer admitted to be true. Thus far the practice is clear; and it cannot be doubted that, in the case now before us, the examination of the defendant, while a replication was upon the file, was irregular; neither do I understand it to be argued that the evidence is admissible, *McDougall* being clearly interested as to all the matters upon which he has been examined. But admitting the irregularity, and admitting the inadmissibility of the testimony, it is contended on the one hand, that the rule which precludes a plaintiff, who has examined a defendant, from obtaining a decree, only applies where the decree asked is strictly adverse to the defendant who has been examined, which, it is argued, cannot be said of this case, inasmuch as the decree that has been asked would be in his favour, and that the ends of justice will be fully attained by excluding the testimony. It is argued, on the other hand, that the rule in question cannot be restricted to the extent contended for by the learned counsel for the plaintiff; that reason and authority shew it to be applicable wherever a defendant concerned or interested has been examined, however such defendant may be affected by the decree; and that in this case, at all events, the decree must be adverse, in the sense in which that term has been used in the cases cited. The objection to which the rule gives rise has certainly assumed different shapes on various occasions. Sometimes it has been presented as an objection to the evidence, at other times as precluding the court from pronouncing any decree. The reason of the rule has also been differently stated; in some cases, it would seem to have been treated as designed exclusively for the protection of the defendant who has been subjected to examination, and in others, as aimed against

(a) *Holmes v. Corporation of Arundel*, 4 Beav. 155; *Baker v. Thurnall*, 6 Beav. 333.

the receipt of improper testimony. Possibly the true reason may be found to be both broader and deeper than either of those assigned. The rule may perhaps be referrible to neither principle exclusively, but may embrace both, assuming a different appearance according to the circumstances of the case in which it may have been applied. Had the rule been exclusively designed for the protection of the defendant to be examined, then it is obvious that an objection upon such ground could only come properly from such defendant himself; his co-defendants would have no concern in the question whether he had or had not been properly made an actor against his own interest, and would therefore have been precluded from urging any objection upon such ground; but it is clear that this objection has frequently been urged by co-defendants, and with success.^(a) On the other hand, had the object of the rule been the exclusion of improper testimony, such an objection could only properly come from the co-defendants; the defendant who may have been examined, could not with reason complain of the receipt of evidence given by himself, and the end would seem to be fully attained by the suppression of the depositions. But, if the mode in which justice is administered in this court necessitated the admission of a party to the record as a witness, upon the *ex parte* statement of the plaintiff that such party is disinterested, and if the rule in question has been adopted to obviate the abuse to which such a practice would have been plainly liable, and to remove the temptation to perjury which would have existed had a plaintiff been permitted to examine a defendant concerned in interest, then such rule would seem equally applicable, whatever may be the nature of such defendant's interest, and however affected by the decree. The objection would then come with propriety from any defendant, without reference to the effect of the evidence actually given, and indeed although no evidence at all were elicited; because, the rule being preventive, to save parties from being exposed to the strong temptation to perjury which would exist, were defendants concerned in interest subject to examination

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(a) Hulton v. Sandeys, 1 Young, 602.

1850. by which that interest could be affected, and not to regulate the admissibility or inadmissibility of the testimony when taken, such a rule would be properly enforced at the instance of any suitor, or by the court *ex mero motu*, and the desired object could only be attained by the court refusing to act, wherever the party examined is found to have been concerned in interest, without reference to the nature of the testimony. This view of the case would seem not only reasonable, but founded upon authority. Lord *Hardwicke* said, in *Carter v. Hawley*, (a) "The rule of this court is, that whenever you examine a defendant as a witness, you cannot pray an adverse decree against him, because that would be charging him on his own evidence, which, if you do, would be a strong temptation to defendants to forswear themselves." Here, indeed, the rule is restricted; it only says you cannot pray an adverse decree. But the reason is much more extensive, and applies with as much, if not more, force where the decree is in favour of the party examined. In *Bernal v. Marquis of Donegal*, (b) Lord *Eldon* said: "If *May* had remained a party to the cause, the examining *May* as a witness would have been clearly on the part of the Marquis saying this, '*I can have no decree against May.*' It would be saying also, '*I cannot give you, May, the benefit of any decree I obtain against Bernal.*'" And Lord *Redesdale*, in arguing the case of *Weymouth v. Royer*, (c) said: "A man cannot be examined for his own interest or against it, because there cannot be a decree for or against him upon his own testimony." But I do not find it necessary now to determine whether the rule be really as extensive as has been suggested. Were it so, indeed, this case would be free from doubt, because it cannot be questioned that the defendant, who has been examined, is concerned in interest. But I am of opinion that, in some respects, the decree asked here is in the strictest sense adverse to the defendant; and in every view in which I have been able to consider the bill, no decree can be pronounced without the determination of certain questions, as between the plaintiff and the defendant who

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(a) Amb. 583 (n).

(b) 3 Dow. 150.

(c) 1 Ves. Jr. 419.

has been examined, which is in effect what is meant by the term adverse claim, as I understand it.

If we are to regard the plaintiff as coming here for the purpose of enjoining an action at law, instituted by the defendants *Maitland* and *Auldjo*, under an agreement entered into with *McDougall*, and in order that the accounts may be taken here, and the plaintiff receive the benefit of an equitable set-off, to which he makes title, (and that would seem to be the true nature of the suit,) no doubt can be entertained, I think, that a decree of that character would be adverse to *McDougall* in the strictest sense of the term.

But assuming the plaintiff entitled to waive the relief which seems to have been peculiarly contemplated, and to treat this as a suit for redemption, or analogous to a suit for redemption, still the decree in that case would involve such a determination of questions, between the plaintiff and *McDougall*, as would plainly render it adverse, even in the narrow sense attributed to the term, or at least, adverse in the proper sense of the term; for, in my judgment, the question, whether the decree be or be not adverse to the defendant, does not depend upon the enquiry, whether it will or will not, in the result, prove advantageous to the defendant, but rather upon this, whether it necessarily involves the determination of questions between those parties. In *Champion v. Champion*, the plaintiffs and one of the defendants had carried on business as co-partners, and having become involved, had assigned their effects to another defendant, (*Thomas Champion*), the largest creditor, in trust, in the first place to pay, out of the amount at which the stock and debts due to the late partnership should be valued, to him, the debts due and owing from the partnership, on the 31st of December, 1839; he was to retain thereout his own debt; and then he was to repay, out of the residue, the sums appearing by the partnership books to be due to each of the late co-partners, on the same day; and lastly, he was to pay and divide whatever balance might remain, unto and between the late co-partners, according to their several and respective interests in the gains and profits of the concern. The Vice-Chancellor of England,

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after stating those trusts, says: "Now how is that to be done without first taking an account of all the dealings and transactions of the partnership between the plaintiffs and *Guy Champion*, and *Wright*? How can the amount to be paid to each of them be ascertained without taking that account?" and after some observations for the purpose of shewing that it would not be equitable to bring the trustee into court in a second suit, he proceeds: "*Therefore the decree must of necessity be an adverse decree, for the purpose of ascertaining, as between the plaintiffs and Guy Champion, what is the amount of the share coming to Guy Champion,*" and he concludes with the observation: "What reason the plaintiffs had for examining *Guy Champion* I cannot discover; but whatever that reason may have been, my opinion is that the bill cannot be maintained."

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If *Champion v. Champion* is to be regarded as accurately defining the practice, it follows, I think, that this bill must be dismissed. I have not been able to discover any way in which the question raised in this suit can be finally disposed of without the determination of questions between the plaintiff and the defendant whom he has examined, and if that be so, the suit, in my judgment, cannot be permitted to proceed. The mortgagees are not to be harassed with a double litigation in consequence of the course pursued by the mortgagor. That course, in my judgment, has prevented the court from finally adjusting the rights of all the parties, and has therefore left us no alternative but to dismiss the bill with costs.

The judgment of the court was delivered by

ESTEN, V. C.—In this case the plaintiff and the defendant *McDougall* are or were partners in trade, and in that capacity became indebted to the mercantile house of *Maitland, Garden and Auldjo*, in a large sum of money, for securing which they executed a mortgage of certain lands in Belleville, Kingston, and the township of Camden, to the members of that house. The lands in Belleville and Camden are admitted by *McDougall* to have been partnership

property; those in Kingston are admitted by him to have been joint property, although he does not expressly say that they were partnership property. All the lands are stated in the bill to have been partnership property. *McDougall* alleges the legal estate of the lands in Belleville and Kingston to have been vested at the time of the mortgage in himself. The properties were all disposed of by way of absolute sale by *Maitland* and *Auldjo*, the surviving partners in the firm of *Maitland, Garden* and *Auldjo*; and the bill alleges, and the answer of *McDougall* seems to admit, that they were so disposed of at a great undervalue. Upon the sale of the Kingston property *McDougall* and his wife joined in the conveyance, or rather executed a separate conveyance, to the purchaser in consideration of £50. The bill alleges, that at this time he had become incapable of transacting business through imbecility of mind; and that *Maitland* and *Auldjo* profited by this incapacity, and thereby procured the conveyance in question. This is denied by *McDougall*; but he admits that he was not consulted as to the sale, or informed of the consideration, or of the manner in which it was to be applied; and that he was induced to accept the £50, and to execute the conveyance in question, by his poverty, and the difficulty which he experienced in procuring another residence, (he having been in possession of the Kingston property at the time of the sale to *Ritter*,) and by the supposition that by means of the sale in question he had been deprived of all right. The bill alleges that he was in possession of divers deeds and other documents material to the defence of the action alleged by the bill, and admitted by the answer to have been commenced for the recovery of the mortgage debt, which he refused to produce; and that he was fraudulently influenced by and colluding with the defendants *Maitland* and *Auldjo*; in other words, that he was endeavouring to impede the prosecution of the suit and to embarrass the defence of the action. This *McDougall* denies. The object of the bill is to obtain an account of the rents and profits of the mortgaged premises since the mortgagees and those claiming under them have been in possession; an allowance of the full value of the property with

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interest ; the application of these amounts towards satisfaction of the debt and payment of the surplus, or a redemption, and an injunction restraining the action at law. The bill also prays, that the conveyance executed by *McDougall* may be declared void as to the plaintiff, or that he may be declared entitled to credit for the full value of the moiety of the Kingston property. The defendant *Elmer* is stated to claim the Belleville property under one *Sampson*, to whom the original sale had been made ; and it prays that the defendants *Maitland* and *Auldjo* may pay *Elmer* a proportionate share of the mortgage debt, and that he may re-convey the Belleville property. The plaintiff has examined the defendant *McDougall* as a witness generally, and it was objected by the other defendants that by reason of this step he could have no degree against him, or, consequently, against them. They also objected that *Sampson*, *Ritter* and the purchaser of the Camden property, were not parties to the suit. After looking at all the cases that were cited on the first point, and at others also, and after the best consideration that I have been able to give to the subject, I am of opinion that this objection should not prevail. The Court of Chancery permits a plaintiff to examine a defendant, and one defendant to examine another, as a witness, provided he is not interested. The order upon which the examination is had suggests that the party to be examined is not interested. It is, however, an order of course, and the suggestion may be untrue. When such is the case various remedies are provided for all parties. In the first place the order may be discharged for irregularity. 2ndly, the depositions may be suppressed. 3rdly, the party intended to be examined may demur to the interrogatories. 4thly, he may object to any decree passing against him ; and lastly, the order reserves all just exceptions to the other defendants, so that they may object to the admission of the evidence, if improper to be received. The objection, that no decree can be made against the party examined, is, I think, personal to that party, and proceeds on the ground that the plaintiff, having obtained an order for his examination on the suggestion that he is not interested, cannot afterwards obtain a decree

against him, which implies that he is. He is, in fact, if interested, discharged from liability by the examination, but he may afterwards waive the objection and submit to a decree, in which case the other defendants cannot insist that no decree shall be pronounced against him; although, if he had not of his own accord submitted to a decree, and if from the nature of the case no decree could have been made against them without a decree being at the same time made against him, they might have objected to any decree whatsoever being made. Now none of these considerations apply where the decree to be made in favour of the plaintiff is not against the defendant who has been examined, but in his favour, which may very well be the case where such defendant and the plaintiff are so identified in point of interest, that whatever decree may be made for the plaintiff must of necessity operate for the benefit of such defendant also. He, of course, will not object to a decree in his favour, nor can the other defendants; who, however, can object to the reception of his testimony on the ground of interest, and this is the remedy in such a case. This was the light in which the matter struck me when the objection was made upon the argument, and subsequent reflection has confirmed my original impression. There is another ground on which a defendant who has been examined can resist a decree. It is, what appears to be the established principle or rule, that you cannot make a man a witness for yourself, and then ask an adverse decree against him. This appears from the fact, that although in England the objection arising from interest has been removed by a late statute, and the order for the examination of a defendant is now actually drawn up without any suggestion that he is not interested, yet he may equally, as before, resist an adverse decree. This objection, however, is purely personal, and cannot be raised by any other person; and the defendant who has been examined may afterwards re-assume of his own accord the liability from which he has been discharged, and then a complete decree can be pronounced against all parties. Such was the case of *Smith v. Smith*. My opinion, therefore, is, that where the case is of such a nature that the decree for

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1850. the plaintiff must necessarily also operate for the benefit of the defendant who has been examined, the objection is to the testimony, and not to the decree. In the present case, the decree which is sought is an account of rents and profits; an allowance of the full value, with interest; a declaration that the debt is satisfied; re-payment of any surplus, and a re-conveyance of the Belleville lands. Now, it is obvious that if the debt has in fact been satisfied by these different claims, especially if there be a surplus, the decree is purely for the benefit of the defendant *McDougall*, and as much for his benefit as for that of the plaintiff. Should it appear that a balance remains due to the defendants, the plaintiff offers to pay it himself; he does not ask that *McDougall* may pay a share of it, nor, in my opinion, are the other defendants entitled to a decree to that effect; and as, with regard to the redemption, the decree would be, that the plaintiff and *McDougall*, or either of them, might redeem and hold the property, when redeemed, as partnership or joint property—or, in default, that the bill should be dismissed, which in my judgment would operate as a decree of foreclosure—the decree to this extent also is entirely in favour of *McDougall* and the plaintiff in an equal degree. The only part of the relief asked, which can be supposed to be adverse to *McDougall*, is, that the conveyance which he executed to *Maitland* and *Garden* may be declared void as to the plaintiff. It is to be observed, that the bill impeaches this conveyance for fraud practised, not by, but upon, *McDougall*; and *McDougall* in his answer seems to admit that it was not properly obtained, although he denies the specific ground upon which it is impeached. It is doubtful, therefore, under these circumstances, whether to declare this conveyance void as to the plaintiff, is to grant relief as against *McDougall*; but supposing it to be so, the only effect of it is, that the conveyance must stand, and the plaintiff must have credit for one-half of the real value of the Kingston property; which is not granting relief against *McDougall*, and is in fact the alternative relief prayed by the bill. I should observe that I consider the conveyance in question to affect only a moiety of the property. The legal

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estate, which had previously resided in *McDougall*, was then vested in *Maitland* and *Auldjo*, and the equitable interest was in the plaintiff and *McDougall*, in equal shares, or jointly as partnership property. If, indeed, it could be considered that these lands were part of the partnership effects, which they are not admitted to be, and effectually disposed of by *McDougall* by virtue of his power as a partner, the sole result would be, that the plaintiff must confirm this transaction, accept credit for £500—the price of the land in question—and be content with the rest of the relief sought by the bill. My opinion is, therefore, that this objection should not prevent the cause from being heard. I should observe, that I do not consider the allowing this suit to proceed, or the stopping the action at law, even under the circumstances stated in the bill, to be granting relief against *McDougall*; but he, in his answer, evinces no desire, and expresses no wish, to obstruct either the defence to the action, or the prosecution of the suit. Of course the court could not insist on the production of any deeds or other documents in the possession of *McDougall*; but he denies in his answer that he has any in his possession. It does not appear to me that any account is required to be directed between the plaintiff and *McDougall*. In fact, to direct an account of the affairs of the co-partnership on this isolated proceeding, relating only to a portion of its effects, would, I think, be improper. With regard to the objection for want of parties, the suit seems to me to be defectively framed in respect of parties for some of the purposes for which it is instituted, but not for all. For the purpose of redemption the record does not appear to be properly constructed, but for the alternative relief I am not aware that any defect can be pointed out in the frame of the suit, except, perhaps, as regards the account of rents and profits, the absence of the representatives of the two trustees who are dead. *Auldjo* seems to represent the firm for all purposes; and the actual parties, as wrong doers, may be deemed to be liable for the real value of the property and interest. These points, however, have not been sufficiently argued; and as they cannot be properly determined

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DAVIDSON V. THIRKELL.

Practice—Executors—Costs—Appeal.

Executors will be ordered personally to repay costs paid to them or their solicitor under a decree which is afterwards reversed in appeal.

Mr. *Brough* and Mr. *Morphy*, for the motion, cited *Pooley v. Ray*. (a)

Mr. *Mowat*, contra, cited *Bluett v. Jessup*; (b) *Howe v. Dartmouth*. (c)

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THE CHANCELLOR.—In this case the defendants, *Counter* and *Heath*, had been ordered to pay the costs of suit to the plaintiff. They paid them under pain of an attachment, and then appealed. The part of the decree which directed them to pay the costs has been reversed, and the bill has been dismissed as to them with costs. The decree has been remitted to this court, with directions to carry it into effect as varied, and the decree of the Court of Appeal has been made an order of this court. The suit was originally instituted by one *Strachan*. He died pending the suit, and the plaintiff *Davidson*, who is his executor, revived it. The costs ordered to be paid, and paid by *Counter* and *Heath* to the plaintiff, included the plaintiff's costs of the suit, and the costs of the defendants *Strachan* and *Masson*, which were ordered to be paid in the first instance by the plaintiff. The present application is for an order for the re-payment to *Counter* and *Heath*, of the costs paid by them to the plaintiff. It is quite clear that that part of the decree of the Court of Appeal, which reverses so much of the decree of this court as directs the defendants *Counter* and *Heath* to pay the costs in question, cannot be carried into

effect without an order of this description, and therefore it must be made. But it was contended by the plaintiff's counsel, that as he was an executor, and may have applied the amount received from *Counter* and *Heath* in payment of debts, he should be ordered to refund, not generally, but *de bonis testatoris*. For this claim, however, no ground whatever exists. It will not, I presume, be contended that the defendants *Counter* and *Heath* are to look for their own costs to the estate. The plaintiff needed not have revived the suit; and in that case the bill would have been dismissed, probably without costs: at all events, the plaintiff would not have been personally chargeable with any. He has chosen to revive the suit, and bring it to a hearing, and thereby placed himself in the same situation as if he had originally instituted it: in which case, it appears from all the authorities, that he would have been personally liable. The case with respect to the costs received by him, is if possible stronger than it is with regard to the defendant's own costs; for, with respect to them, all that is required is the re-payment of a sum which he has actually received. It is not shewn that this amount has been in fact applied in the payment of the debts; and if it had been, it would have made no difference; for it appears from the case of *Pooley v. Ray*, and the cases there put, that if an executor recover and receive a sum of money improperly, and apply it in payment of debts, and afterwards the judgment or decree be reversed, he must re-pay the money out of his own pocket. The order, therefore, must be made generally.

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RE HODGES.

Mortgagee—Infant—Practice.

Where a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order; and his executor revives the suit and obtains such order, and the mortgage debt equals or exceeds the value of the mortgaged premises—the infant heir is a person seised upon trust, within the meaning of the English statute 11 Geo. IV., and 1 Wm. IV., ch. 60, sec. 6, and may be ordered on petition without suit to convey the estate to the executor, or to a purchaser from the executor.

In such a case, however, the court will not make the order, unless it appears that the application of the estate in question is necessary for the satisfaction of the debts of the intestate; and a reference as to this will be directed. On an application by the executor of a mortgagee, for the infant heir of the

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mortgagee to convey after the executor has obtained a final order for foreclosure; the petition and affidavits should be entitled, not in the cause, but in the matter of the infant.

It appeared from the petition and affidavits filed in this matter, that *Richard Hodges*, the father of the infant, had instituted proceedings to foreclose a mortgage of lands in this province, but had died before the final order for foreclosure had been obtained. The executors of the deceased had revived the suit and obtained a final order, and then petitioned in the cause, for an order directing the infant heir to join in the conveyance of the mortgage premises, to a person to whom the executors had contracted to sell them.

Mr. *Turner*, for the executors, cited *Kingdom v. Bridges*, (a) *Awdley v. Awdley*, (b) *Exp. Whitton*, (c) *Re Kent*, (d) *Re Williams*, (e) 2 Powell on Mortgages, 666.

Judgment. THE CHANCELLOR.—In this matter one *Stewart*, being seised in fee for certain premises, conveyed them to *Richard Hodges* in fee, by way of mortgage, for securing the sum of £125. *Richard Hodges* instituted proceedings in this court upon that mortgage, and obtained the usual decree, but before he had obtained the order for foreclosure absolute he died, intestate as to the mortgage premises. The suit was revived by his executors and heir at law, and the order for foreclosure absolute obtained. The executors (treating *William Hodges* as their trustee) have filed their petition in that suit, praying that the heir of *Richard Hodges*, who is still an infant, may be ordered to join in a conveyance of this property, in pursuance of a contract of sale entered into by them.

Apart from the fact of the bill of revivor, and the decree of foreclosure absolute, this case would seem to present no difficulty. No doubt can exist that *William Hodges*, prior to those proceedings, was seised by way of mortgage, and as such would have fallen expressly within the provision of the 6th section of the Imperial Act 1 Will. IV., ch. 60. I am not aware that this point has ever been questioned. The 8th section provides for difficulties which had been experienced

(a) 2 Vernon, 67.
(d) 9 Simons, 501.

(b) 2 Vem. 193.
(e) 9 Sim. 642.

(c) 1 Keene, 278.

where parties seised of land upon any trust were out of the jurisdiction, or had died without heirs, and in other cases. Doubts appear to have existed whether the legislature intended to include mortgagees within the class of persons specified in that section, "as seised of land upon any trust." It is incorrect to say that doubts existed; I should rather say that it had been repeatedly determined (and I think correctly) that, upon the true construction of the act, mortgagees were not included within the 8th section. In subsequent cases, however, courts of equity have regarded 4 & 5 Will. IV., ch. 23, as having placed upon the 1 Will. IV., ch. 60, a construction different from that which it had received in the cases to which I have alluded; and since that act equity judges have assumed the jurisdiction of ordering conveyances where mortgagees have died, leaving heirs, either out of the jurisdiction or not to be discovered. (a)

This case, however, comes within the 6th section; and had the application been that the infant should convey to the mortgagor, upon payment of the mortgage money, or should join in an assignment of the security, the jurisdiction to pronounce such an order would have been manifest. But here an absolute foreclosure has been obtained. Before we order an infant mortgagee to convey under such circumstances, we must be satisfied that he has not some interest, "adverse to that of the executors." We have not been referred to any decision since the 1 Will. IV., nor have we been able to discover any. The older authorities leave the rights of the heir of a mortgagee, under such circumstances, somewhat undefined. The moment courts of equity had determined that land conveyed in fee simple, by way of mortgage, ought to be regarded, even after condition broken, as a mere pledge, and that upon the death of the mortgagee the estate was still to be regarded as personalty, it followed as a necessary consequence, that those in whom the legal estate might happen to be vested should be treated as trustees for the personal representative of the mortgagee. Has the decree of foreclosure pronounced in this case varied the position of *William Hodges*? Is he still to be treated as a trustee for

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(a) In re Wilson, 8 Sim. 392; Exp. Witham, 1 Keene, 278.


1850. the personal representative; or as having the estate now made absolute by the decree of the court, subject only to a charge? We find no case directly deciding the point; and the language of the text books is equivocal. Various dicta may be found to the effect that the heir may, under such circumstances, pay the debt, and retain the estate. Possibly it may not be unreasonable to allow the heir this privilege, although it is not very easy to reconcile it with principle. If it be proper to treat the security as belonging to the personal estate, upon the death of the mortgagee, one does not very readily perceive how the act of the personal representative, on proceeding to realize such security, can be consistently regarded as conferring any title upon the heir. I should not be prepared, without more consideration, to deny the right of the heir to pay the debt and retain the estate. But assuming that right, it is in my opinion more in accordance with the principle to treat the heir as a trustee, to whom the court permits the peculiar privilege of which I have spoken, rather than as owning the estate subject to the debt.

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On the whole, I have come to the conclusion, though with hesitation, that it is competent to us to make the order which has been asked. We shall be able to afford the heir, in this mode of procedure, all the protection he could claim if this were a regular suit; and the view of his position which warrants us in making this order, seems to me conformable with principle, and is certainly convenient, as tending greatly to relieve the estate from the costs of an expensive litigation.

JAMESON, V. C., concurred.

ESTEN, V. C.—In this case, it appears that *Robert C. Stewart* made three several mortgages of the lands in question in this matter; the first to *Richard Hodges*, the second to *George Denison*, which was subsequently transferred to *Robert J. Turner*, and the third to *J. F. Maddock*. Default having been made in the payment of the money secured by the mortgage secured to *Richard Hodges* he instituted a suit by original and amended bill against *Turner*, *Maddock* and *Stewart*, for a foreclosure; and having obtained the usual interlocutory decree, and after the master had made his

first report in the cause, died intestate as to these lands; 1850.
 having however made his will and thereby appointed his 
 wife, *Ann Hodges*, his son and heir at law, *William Hodges*,
 an infant, and one *John Hodges*, his executrix and execu-
 tors, and given all his property, real and personal, to his
 wife and son in equal shares. The will was proved by
Ann Hodges and *John Hodges* alone, and they and the
 infant heir revived the suit, and obtained absolute orders of
 foreclosure against *Turner*, *Maddock*, and *Stewart*, succes-
 sively; the final one having been made in February, 1849.
Ann Hodges and *John Hodges* then sold the premises to
Eliza Hodges and *Jane Hodges* for £200, of which £134
 has been paid, and the purchasers have been let into pos-
 session. The present application is made by *Ann Hodges*
 and *John Hodges*, for an order that the infant heir shall
 convey to the purchasers, under the acts 11 Geo. IV. and 1
 Will. IV., ch. 60, secs. 6 and 18, and the question is,
 whether the infant heir is a person seised by way of mort-
 gage, or upon trust, within the meaning of those sections
 of the act in question. I should premise that the affidavit is
 entitled in the matter, while the petition is entitled in the
 cause. This discrepancy must of course be rectified. Al-
 though the application is said to be made under the 11 Geo.
 IV. and 1 Will. IV., c. 60, it is not accurate to say that
 those acts are in force in this province. The fact is, that
 the act establishing this court conferred on it all the powers
 then belonging to the Court of Chancery in England, in the
 matters specified in the act; and of course it is immaterial
 whether those powers were derived from the common law,
 or from statutory enactment. Whatever they were, and
 from whatever source they were derived, they were commu-
 nicated by the act last mentioned to this court. The law
 under which this application is made has undergone a sin-
 gular alteration. The 8th section of the 11 Geo. IV. and
 1 Will. IV., ch. 60, names only trustees, not mortgagees,
 and relates to cases in which the trustee is out of the juris-
 diction, or not amenable to the process of the court; where
 it is uncertain which of several trustees was the survivor,
 or whether the trustee last known to be seised is alive or

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1850. dead, or who is his heir; and where the trustee refuses for 28 days to execute a proper deed of conveyance of the trust property. The framer of the act certainly did not intend to include mortgagees, or the heirs of mortgagees, in this section. Accordingly in *Re Goddard*, (a) which occurred in November, 1832, where the mortgagee was dead and his heir was unknown, and the mortgagor applied for the appointment of a person to convey in the place of the unknown heir, on payment of the mortgage money to the personal representatives, the order was refused. This case went upon the principle that a mortgagee was not a trustee within the 8th section. Then came the case of *In re Stanley*, (b) decided in August, 1834, where the mortgagee died, having bequeathed all the residue of his personal estate, his heir being unknown. The residuary legatee—all the funeral and testamentary expenses, debts and legacies, having been paid—applied for the appointment of a person to convey to him, in place of the unknown heir; but the order was refused on the same principle. This case was followed by that of *Prendergast v. Eyre*, (c) decided by the framer of the act himself, in January, 1835. In this case the mortgagee had obtained a decree of foreclosure and sale in the Court of Chancery in Ireland, and then died, leaving an infant heir who was out of the jurisdiction. The suit was revived by the executor, the heir being made a party defendant, and the estates were sold. An application was made for the appointment of a person to convey in room of the infant heir; and Sir *Edward Sugden*, admitting that mortgagees, or the heirs of mortgagees, were not within the 8th section, determined that the mortgagee, by obtaining a decree of foreclosure and sale, had put an end to the mortgage and converted himself into a trustee; and that his heir could not stand in a different situation from himself, and was therefore a trustee out of the jurisdiction, within the 8th section of the act. The next case in order of time is *In re Dearden*, (d) decided in April, 1835, by the present Lord Chancellor, then Master of the Rolls. In that case, one of the co-heirs and next of kin of a deceased mortgagee, the

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(a) 1 My. & K. 25.

(b) 5 Sin. 320.
(d) 3 M. & K. 508.

(c) 1 Ll. & Goo. 180.

devisee executor and residuary legatee of the original mortgagee, who had died intestate as to the mortgaged lands, but had made a will appointing executors, was out of the jurisdiction. It does not appear who was entitled to the mortgage money beneficially. The mortgagor, desiring to pay off the mortgage, applied to have a person appointed to convey, in the place of the absent co-heir; but it was refused by the Master of the Rolls, who seemed to think that the absent co-heir was not within the 18th section, because he had or claimed an interest adversely to the party seeking the conveyance, and had not been declared a trustee for him in a suit. This case was followed by *Ex parte Payne*, (a) where a mortgagee, having given all his property by will to certain persons, it was arranged between the mortgagor and the executors that the mortgaged premises should be conveyed to a trustee, with a view to their re-conveyance to the mortgagor, upon payment of the mortgage-money. One of the devisees and legatees refused to join; and it was decided by the Vice-Chancellor of England, that he was not a trustee, within the 8th section of the 11 Geo. IV., and 1 Will. IV., ch. 60, for the executors. Several of the foregoing cases were decided after the passing of the 4 & 5 Will. IV., c. 23; but attention was not called to the effect which its provisions had upon the construction of the 11 Geo. IV. and 1 Will. IV., c. 60, until the case of *Ex parte Whitton*, (b) occurred. In this case, the mortgagor and executors of the mortgagee joined in conveying to a purchaser, who presented a petition praying the appointment of a person to convey in the place of the heir of the mortgagee, who was unknown. The Master of the Rolls, upon the joint operation of the acts which have been mentioned, made the order. This case therefore decided that a mortgagee was a trustee within the 8th section of the act. Upon the decision of this case, that of *Ex parte Stanley*, which has been before mentioned, was again placed in the paper and mentioned to the Vice-Chancellor, who, upon the authority of *Ex parte Whitton*, made the order prayed, thereby deciding that the residuary legatee of the mortgagee, all the

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(a) 6 Sim. 645.

(b) 1 Keen. 278.

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having been paid, was entitled to the relief given by this act. It is clear, therefore, that where a mortgagee dies seised, his heir, or devisee, if known, or a person in his place if unknown, will be ordered to convey to the mortgagor, if the mortgage-money have been paid, or, if not, to the executors of the mortgagee, or the residuary or other legatee of the mortgagee, where the debts and funeral and testamentary expenses have been paid, or to a purchaser from the mortgagor and the executors. The cases, however, which have been mentioned, are different from the present. In those cases the mortgage was still subsisting, and the interest of the mortgagee's representatives was strictly pecuniary. In the present case, the mortgage is at an end, and therefore the heir is not a person seised by way of mortgage, within the 6th section of the 11 Geo. IV. and 1 Will. IV., c. 60. The only question is, whether he is a person seised upon trust within the meaning of that section. *Mr. Turner*

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contended that in every case, where an absolute foreclosure has been obtained after the death of the mortgagor, the heir is a trustee for the executors; and if this doctrine can be maintained in its full extent, there can be no difficulty in making the order prayed in the present instance, because undoubtedly the heir will be an infant trustee within the meaning of the 6th section. But I do not think that this doctrine can be maintained in its full extent. After looking at all the cases which were cited upon this point, and at others also, I am of opinion that, where an absolute foreclosure is obtained after the death of the mortgagee, the heir is entitled to the land, subject to the mortgage-money. Where therefore the value of the land exceeds the amount of the mortgage, the heir is not a person seised upon trust at all, but the beneficial owner of the land, subject to a charge, and is not within the 6th section. But where the debt exceeds or equals the value of the land, the heir is a trustee, and, if an infant, may be ordered to convey according to that provision. The only question is, whether he has or claims an interest adversely to the executor, within the meaning of the 18th section; in which case, be-

fore any order can be made for him to convey, he must be declared a trustee for the executor in a suit. In *Ex parte Dearden*, the present Lord Chancellor, then Master of the Rolls, appeared to think that the heir of the mortgagee had or claimed an interest adversely to the mortgagor, who was ready, upon receiving a re-conveyance, to pay the mortgage money to the executors. It does not appear that the individual in question was entitled to any part of the mortgage money, and therefore it may be assumed that the decision did not turn in any degree upon that circumstance. I must confess that the proposition advanced in that case is one which I am altogether unable to comprehend. It must be admitted that the executors were entitled to receive the mortgage money; and how, therefore, when it was paid to them, the heir could be deemed to have or claim an interest adversely to the mortgagor, for whom he was a bare trustee, I am at a loss to conceive. In the present case the heir, if not a mere trustee for the executors, is only entitled to the land, subject to the mortgage money. He cannot be said to have or claim any interest *adversely* to the executors. He must acknowledge that their title is paramount to his own, and that he can claim only what remains after satisfaction of their demand. The case presents not a dispute of title, but a question of value. If the act meant that in every case, where any question of any description whatever should arise, the alleged trustee must be declared to be a trustee in a suit, the present application cannot be sustained. But if it meant to confine that provision to cases in which the title should be in dispute, or in which a fair question should arise as to the title, then it will not exclude the present application. Can it be said that a suit is necessary in order to determine the value of this property? It is the duty of the court to advance every claim that can be made on behalf of the infant. In the case of *Ex parte Williams*, (a) it seems to me that a fair question arose as to the title, and therefore the court refused to make the order sought upon petition. I confess I do not think that the exception in the 18th section was intended to apply to a case like the pre-

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1850. *Re Hodges.* sent; and therefore, that if the mortgage money equals or exceeds the value of the land, the order prayed can be pronounced. To decide this point, a reference to the master is necessary; and as the court, although it may consider the infant a trustee within the rule, is not, I apprehend, obliged to make the order, the reference must include an enquiry as to the debts, and whether the application of this estate is necessary for their satisfaction; for if not, inasmuch as the infant in that case appears to be beneficially entitled in part, the order would be unnecessary and improper. In fact, under such circumstances, he is a trustee for himself and his mother. The petition must stand over, in order that it and the affidavit may be entitled in the same manner; and as I am not clear that such a petition can now be properly granted in the suit, they had better be entitled in the matter of the infant.

Judgment.

CHISHOLM V. SHELDON.

Practice—Solicitor—Amendment.

A defendant in equity has no right to call upon the plaintiff's solicitor to produce his authority for using a plaintiff's name; and particularly where no case of improper conduct, on the part of the solicitor in using such plaintiff's name, is positively alleged and verified.

A redemption suit having stood over at the hearing, with leave to amend by adding parties as plaintiffs or defendants, the plaintiffs added the new parties as co-plaintiffs, and amended that part of the prayer of the bill which asked that the plaintiffs might be directed to "surrender and deliver up possession of the mortgaged premises to" one of the then plaintiffs, so that in the amended bill it ran thus:—that the defendants might "be directed to surrender and to convey or assign for the residue of the term therein created as aforesaid, and deliver up possession of the mortgaged premises to" all the plaintiffs to the amended bill. *Held*, that this amendment was not so unconnected with the order to amend as to render a motion to expunge the same proper.

When a cause stands over with leave to amend by adding parties, the plaintiff has no right to introduce any amendment, though immaterial, that is unconnected with such leave.

This cause having been ordered to stand over with leave to amend by adding parties, plaintiffs or defendants, as the then plaintiffs should be advised, (a) they accordingly amended by adding, amongst others, *William M'Kenzie Chisholm*, another of the plaintiffs in the original bill, as a co-plaintiff, the amended bill stating, that at the time the original bill was filed the said *W. M'Kenzie Chisholm* was residing in the United States of America or in California.

(a) See ante page, 108.

Mr. *Turner*, for the defendant *Sheldon*, thereupon moved for an order to compel the solicitor of the plaintiffs to produce his authority for using the name of *W. M. Chisholm*, contending that the facts disclosed in the amended bill were sufficient to shew that his name had been introduced as a plaintiff into the amended bill without his authority; or that the amendments made by the plaintiffs (and which are sufficiently set forth in the head note) might be expunged, as having been unauthorised by the order giving leave to amend, citing, amongst other cases, the *Exeter & Crediton Railway Company v. Buller*, (a) *Wilson v. Wilson*, (b) *Hood v. Phillips*, (c) *Lucton (School) v. Smith*, (d) *Attorney-General v. Cooper*, (e) *Primer v. Knights*. (f)

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Mr. *Brough*, contra. There is no affidavit filed attributing any improper conduct to the solicitor, and in the absence of any such the court will presume that he is acting correctly. As to the statement of the party's residence in the United States or California at the time the original bill was filed, there was nothing, he submitted, in such statement incompatible with the fact of his now being resident in this country.

Argument.

With regard to the amendment complained of, as being unwarranted by the order to amend, he submitted, that having leave to add parties as advised, it must be evident that the plaintiffs were at liberty to add such statements as will shew them to be necessary parties, and also to frame the prayer in such a manner as to make it consistent with the fact of their being parties. On the whole, he submitted, that although the prayer of the bill, as at first framed, might have been sufficient for the purposes of the amended bill, still the amendment was not such as could possibly warrant the court in ordering it to be expunged, and that the motion must, therefore, be refused with costs.

THE CHANCELLOR.—When this cause was before us lately we ordered that it should stand over, with liberty to plaintiffs to amend by adding parties, plaintiff or defendant, as they should be advised, and also to exhibit an interrogatory to prove the will of the testator in the pleadings named.

(a) 11 Jur.st. 527.

(d) 1 McCl. 17.

(b) 1 J. & W. 457.

(e) 3 M. & Cr. 258.

(c) 6 Beav. 76.

(f) 6 Beav. 174.

1850. Under that order the plaintiffs have amended their bill by adding several persons as parties plaintiff, and amongst the number *William M'Kenzie Chisholm*. They have also amended their bill in other particulars, to which we shall allude presently. The defendants now move that the bill may be dismissed, *William M'Kenzie Chisholm* having been made plaintiff without authority; or that the solicitor for the plaintiffs may produce his authority; or that the amendments, so far as they are unauthorised by the order of the court, may be expunged.

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It is not very easy to discover any principle upon which the first part of this relief has been asked. Although the plaintiff's solicitor should fail satisfactorily to establish the requisite authority—nay, although *William M'Kenzie Chisholm* should disclaim the suit—that would not furnish ground to dismiss the bill. Where a necessary party declines to become co-plaintiff he must be made defendant. But this motion is, that the bill may be dismissed.

Judgment.

The second alternative seems more reasonable, but, in my opinion, must also fail. A proceeding apparently somewhat analogous prevails in courts of law. But the practice of filing warrants in those courts was enforced and regulated by several old statutes, as well as by rules of the various courts. Yet, notwithstanding these regulations, and the necessity for some formal observance of them, in consequence of the stamp upon the warrant, the whole practice was regarded as formal, and offers little in the way of analogy to sanction this application. Courts of law have, I believe, under special circumstances, extended the practice beyond the filing of a mere formal warrant, but even there, I am confident, that such an application as the present would not be entertained. In this court the system of filing warrants never prevailed; and no precedent of a motion similar to the present has been adduced. Parties whose names have been improperly employed have been allowed to move to be relieved from such unauthorised proceedings. Motions of even that character have not always prevailed. The tendency of both jurisdictions is to hold such proceedings conclusive, leaving the parties to their remedy against the solicitor who

has assumed to act (a). In this court so strong has been the tendency that motions of this sort have been ordered to stand over to the hearing. And no single case has been cited in which a solicitor has been called upon to produce his authority at the instance of an adverse party. But assuming such a jurisdiction to exist, it assuredly can only be exercised upon a case of improper conduct verified in the ordinary way. A solicitor discharges this, as all other portions of his duty, under heavy responsibility ; and until some improper conduct has been alleged, the court must intend that his duty has been honourably discharged. Here no case has been made. Were we to grant this application, I see no reason why a similar motion might not be made in every suit instituted in the court—a precedent, in my judgment, inconvenient and injurious to the interest of suitors. Nor do I perceive that this determination is likely even to inconvenience defendants. Where the plaintiff resides within the jurisdiction, an opportunity of communication is afforded where any impropriety is suspected, and, by such communication, the client is either bound by the acts of his attorney, or applies to be relieved in the ordinary way. On the other hand, where the plaintiff resides out of the jurisdiction, a defendant is entitled to security for costs, and the attorney is ultimately responsible where his proceedings have been unauthorised. Upon these grounds we think the second branch of the rule also fails.

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Then with regard to the last branch of the motion, the only amendment objected to is that which has been made in the prayer. The passage in the original bill ran thus :—that “the defendants may be directed to surrender and deliver up possession of the said mortgaged premises to your orator, the said *George King Chisholm*.” In the amended bill this passage is added after the word surrender, “and to convey or assign the same for the residue of the said term therein created as aforesaid.” It was urged that this amendment is either immaterial, and so an unnecessary and unauthorised alteration of the pleadings ; or else material and therefore *a fortiori* objectionable, if not warranted by the order.

(a) Hood v. Phillips, 6 Beav. 176.

1850. Whether material or not, this cannot, I think, be treated as an amendment made at the mere will of the plaintiffs. A gratuitous alteration of the pleadings, which (in however immaterial a point) is not allowed. Amendments may be made in the prayer, as well as in other parts of the bill. An order to amend by adding parties, involves the introduction of such allegations as may be necessary to connect the new parties with the suit. Such amendment may involve a variation of the prayer also. And in this particular case an alteration of the prayer was not only regarded as possible, but was alluded to in our judgment as probably necessary. In the abstract, therefore, the amendment of the prayer, under this order, would not be irregular. Then is this amendment, whether material or immaterial, so unconnected with the order to amend, and unauthorised by it, as to render it proper for us to direct it now to be expunged? The amendment is, I think, immaterial. Whether the term surrender in the prayer of the original bill was used in a strictly technical or in a more general sense, I cannot say; probably it was used in the strict sense; and as facts stood at the time of filing the bill, that would have been the appropriate relief. But subsequent events, disclosed by the defendant *Tiffany*, have rendered an assignment of the term, and not a surrender of it, proper. I am of opinion, however, that the court would have decreed that relief (if relief can be at all decreed) without this special prayer, and notwithstanding the prayer for a surrender had been continued. (a) But though immaterial and unprejudicial to the defendant, it may be so unconnected with the order to amend, and therefore so unauthorised, as to render this motion to expunge proper. But I am of opinion that it is not so. That portion of the amendment which asks a transfer of the possession to all the plaintiffs, or to the executors in trust for all, has not been objected to, and seems clearly proper. The question then is, whether, when the latter part of the sentence was being altered, it was or was not allowable for the plaintiffs to vary the former by rendering it conformable with the existing state of facts. We are

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of opinion that the amendment, although unnecessary, was allowable and authorised by the order; and that the motion must therefore be refused with costs.

JAMESON, V. C., concurred.

ESTEN, V. C.—This was a motion to compel the plaintiff's solicitor to produce his authority for using the name of one of the parties as a co-plaintiff in the amended bill, and to expunge part of the amendments as not warranted by the order, which was pronounced at the hearing of the cause. Upon the latter point I have formed and express no opinion, as it belongs to the Chancellor and my brother *Jameson*, who pronounced the order in question, to determine its true scope and meaning, and they have decided that it did authorise the amendment referred to. Upon the other point I have consulted the authorities which were cited in the argument, and some others also. It is remarkable that not a single instance can be produced of such an application as the present on the part of a defendant; and yet it cannot be doubted that a defendant, who is harrassed with litigation in the name of a person who has not authorised it, must have the power to complain of it, and to procure it to be discontinued. Where the name of a plaintiff is used without his authority, if the bill should be dismissed with costs, he will be liable to the defendant, but must be indemnified by the solicitor; and he can at any time procure the bill to be dismissed with costs as between solicitor and client, to be paid by the solicitor who has used his name without authority. This application is of course founded on his own affidavit positively negating the authority, which is the strongest evidence that the case admits of, and throws upon the solicitor the onus of proving an express or implied authority. A solicitor who institutes a suit in the name of another person without his authority, is not only liable for the costs of it, but is, I presume, in strictness guilty of a contempt of court. It is not therefore to be lightly presumed that he will act in such a manner, and a strong case must be shewn for calling upon him to produce his authority. In accordance with this is what I understand to be the practice in the courts of common law, and an American

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1850. decision mentioned in a note to the American edition of Daniell's Chancery Practice. In the present case no affidavit has been produced on the part of the defendants who make this application; and the sole ground on which it is rested is the statement in the amended bill, that a co-plaintiff, whose name is suspected to be used without authority, was, when it was filed, either in the United States or in California. This was on the 25th of January last, and the order to amend was pronounced on the 4th of the same month, while the objection for want of parties was made at the hearing of the cause, which took place some time before. I think it is quite consistent with his having sanctioned this amendment that he should have been in the United States or California on the 25th of January last. I have some doubt whether an application of this kind can be made by a defendant, where the subject of complaint is, that the name, not of a sole plaintiff, but of a co-plaintiff, is used without authority. But however that may be, I do not think that a sufficient ground has been laid for calling upon the solicitor here to produce his authority, and, therefore, this application must be refused with costs.

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Judgment.

FARISH V. MARTYN.

Practice—Time to demur.

A former decision on a point of practice—that defendants, before the orders of May, 1850, had in this country, as in England, twelve days only after appearance to demur—was followed, though, if *res integra*, a majority of the present court might have decided the point differently.

A demurrer filed after the twelve days was, therefore, ordered to be taken off the files for irregularity with costs. (ESTEN, V. C., *dissentiente*.)

Per ESTEN, V. C.—Affidavits cannot be read on a motion where the intention to read affidavits thereon is not mentioned in the notice of motion.

Mr. Read, for the plaintiff, moved to take the demurrer off the files for irregularity, the demurrer not having been filed for 28 days after appearance, and not served until the day after the filing thereof. The 10th English order of 1833 (2 Smith's Practice, 472) requires demurrers to be filed in 12 days. This court, before May, 1850, made no alteration in the period allowed for demurring, though the time allowed for answering was changed. The 98th and 99th orders of this court, in fact, expressly recognise diffe-

rent periods as allowed by the practice for demurring alone and for filing any other pleading. They point out what may be done at the expiration of the time "allowed to a defendant to plead, answer or demur, (*not demurring alone.*)" 1850.

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The 97th, 110th, 111th, 136th and the 137th orders were also referred to; and the decision of his Honour Mr. V. C. *Jameson*, in an unreported case of *Robertson v. Meyers* on the very point in question.

Mr. *Mowat contra.* The first order of this court by implication puts an end to any distinction here between the time allowed for answering and the time allowed for demurring alone. It gave in a town cause eight days after appearance to answer, and in a country cause fourteen days instead of eight and ten weeks respectively, as the English practice then allowed. The term "answer" in this order must have meant "plea, answer or demurrer," for the court could not have intended to give eight days to answer in some cases, and fourteen in others, and yet leave in force the English order, which gave twelve days in all cases to demur alone, and eight or ten weeks to plead. Judgment.

The subsequent orders, 64, 69 and 193 confirm this view. The 10th order of 1833, is, therefore, not in force in this country. And before that order a demurrer might be filed at any time before attachment. *East India Company v. Henchman.* (a) There was no attachment in the present case. The 98th and 99th orders, passed in 1842, could never be construed as impliedly introducing an English order abrogated by the first order of this court in 1837. The time of serving the office copy is immaterial, but if it were, the affidavit on the point cannot be read no reference being made to it in the notice of motion.

THE CHANCELLOR.—This is an application to take the demurrer of the defendant, *Martyn*, off the files, for irregularity. An appearance was entered for the defendant on the 8th of March, and the demurrer only filed on the 5th of April; so that if the 10th order of the English orders of December, 1833, be in force, the demurrer is clearly out of

(a) 3 B. C. C. 372.

1850. time and this motion must prevail ; if, on the other hand, that order be not in force, then no process of contempt having issued, the demurrer would seem with equal clearness to have been regularly filed.

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Had this been *res integra*, I should have been of opinion, I think, that the order in question was not in force. My opinion would have been, I think, that the first order of this court is inconsistent with the order in question ; and I should have considered it as virtually excluded. And although there are some things in subsequent orders which apparently pre-suppose its existence, yet I do not think that I should have found any thing there sufficiently clear to have outweighed the presumption arising upon the 1st and 64th orders.

Judgment. But I cannot regard this question as any longer open. The very point was brought under the consideration of Mr. Vice-Chancellor *Jameson*, in the case of *Meyers v. Robertson*, and after argument, my learned brother came to the conclusion that the order was in force, and he so decided. Now, whatever may have been the proper inference from the orders, prior to the decision of *Meyers v. Robertson*, I cannot but regard this case as a positive introduction of the order. There was nothing incompatible in that order at the time of the decision to which I have referred. Its introduction would seem to have been proper enough. We have thought it right to introduce it by express order since. Under such circumstances, I do not feel at liberty to depart from the practice as laid down by my learned brother ; and am of opinion, therefore, that the motion must be allowed with costs.

JAMESON, V. C., concurred.

ESTEN, V. C.—In this case, the defendant appeared on the 8th of March, put in a demurrer to the whole bill on the 5th of April, and served an office copy on the 6th. The present application is to take this demurrer off the files, on the ground that it was not filed in due time. The motion proceeds on two grounds. One is that the order of 1833, limiting the time for demurring to the whole bill to twelve days after appearance, is in force in this province ; the other,

that supposing such not to be the case, the demurrer ought at least to have been filed within the 28 days allowed to a defendant to answer the bill; which was not the fact, inasmuch as the act of filing is, by the 135th order of court, not complete until service of the office copy, which was not done until the 29th day. This depends in some degree upon another question, namely, whether the affidavits produced by the plaintiff, not having been mentioned in the notice of motion, can be read. The order of 1833 would, I suppose, have been in force in this court, had it not been excluded, as I think it was, by our first order. It was not introduced by the 64th and 69th orders, which were intended only to lengthen the time for answering, without making any other alteration in the practice. The 98th, 99th, 110th, and 111th orders have not, I think, the effect by implication of introducing an order of so much importance, as the one which is relied on. The implication, besides, is not a necessary one, inasmuch as these orders admit of a construction which will enable them to stand without the introduction of the order in question. With respect to the 111th order, which is the strongest in this respect, the introduction of the order of 1833 would only partially remedy the difficulty. For these reasons, I think that a defendant in this province, before the introduction of the present orders, had the same time to demur to the whole bill as to answer, namely, 28 days from the time of appearance. The present application proceeds in part upon the supposition that he could not in any case so demur after the expiration of that time; but such a rule, even if it existed, would not help the plaintiff in the present case, inasmuch as it does not appear that the demurrer was not filed in due time, except by the affidavits; which, in my judgment, cannot be read, as they have not been mentioned in the notice of motion. The 137th order does not apply to such affidavits as the present, and the 136th does not dispense with the necessity of mentioning affidavits in the notice of motion. But if these affidavits could be read, they would not entitle the plaintiff to what he asks by his present motion. The practice under the late orders of this court, which remain

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1850. in force as to existing suits, was the same in this respect as it was in England before the introduction of the order of 1833; and by that practice a defendant could demur to the whole bill at any time before an attachment had been sealed, notwithstanding the time for answering had expired. The case of *Boys v. Morgan*, (a) has no application. I am therefore of opinion that the demurrer was regularly filed in the present case, and that the motion must fail; but that costs cannot be given to the defendant, inasmuch as the case of *Robertson v. Meyers* afforded ground for this application.

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This, however, is the only effect that I can attribute to that case. I cannot consider it as introducing the order in question. Nothing was further from the intention of the court, which decided the case upon the supposed effect of the orders as they then stood. This is shewn by the order itself, which was, that the demurrer should be taken off the files. This would have been extremely unjust to the defendant, if the court did not think that the order had been introduced, but intended thereby to introduce it. The question was, whether the orders which had been issued had had the effect by implication of introducing the order in question. The court could not have intended to pronounce upon the practice as it was, and also to alter it. The case was certainly decided on the supposition that the order had in fact been introduced, as the result shewed. If so, the court could not have intended to introduce it. The case of *Byfield v. Provis*, (b) is no authority for this construction. There the alteration was not made by the decision which was in conformity with the existing practice, but the Lord Chancellor said that it must be the last time that it should be pursued. In fact, it was an order of court promulgated *ex cathedrâ*. Besides, the court might very well refuse to entertain a second petition of re-hearing without leave first obtained, but to order a demurrer off the files because not filed within a limited time, if that time had never in fact been prescribed, seems a strong measure. It would be mischievous, I think, to hold that a decision, although wrong according to the practice upon which it

(a) 9 Sim. 262.

(b) 3 M. & C. 437.

professes to proceed, must nevertheless be right, because *ipso facto* it allows that very practice, and makes that to which it failed to conform conformable to itself. A judgment on the practice should, like every other, be presumed to be right, and should be followed. But if it be suggested that it is wrong and ought to be reviewed, and upon examination it proves to be wrong, it should not, in my humble judgment, be considered as altering the practice, but should be overruled. Some of Lord *Lyndhurst's* early decisions on his own orders were reviewed and overruled.

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MEYERS V. LAKE.

Solicitor—Purchase of pretended title.

Where a solicitor of this court purchased a widow's right to dower in all the lands of which her husband was seised during her coverture, taking from her an assignment thereof and a power of attorney to use her name in suing for the dower, six years after the death of her husband, and several years after the purchase so made by him, filed a bill in the name of the widow, for the purpose of having dower assigned to her in a particular portion of her late husband's lands—not noticing the sale to himself; the court, on the application of the widow, ordered the bill to be taken off the files, with costs to be paid by the solicitor.

This was a motion to take the bill filed in this cause off the files of the court, the same having been filed by the solicitor without any authority from the client, and he himself being the person beneficially interested in the matter.

The facts of the case are fully set forth in the judgment of the court.

Mr. *H. Eccles* and Mr. *Strong* appeared for the motion.

Mr. *Turner*, contra.

THE CHANCELLOR.—This is a motion to have the bill taken off the files, the proceedings not having been authorised by the plaintiff. The bill was filed in the month of August last past, for the purpose of having the plaintiff's dower in the undivided half of lot number six in the first concession of the township of Marysburgh assigned to her. It alleges that *Peter Walden Meyers*, the husband of the plaintiff, was seised in fee simple of the premises in question during the coverture, and conveyed them in fee to one *Stickle*, who conveyed them in like manner to the present defendant.

Judgment.

1850. The bill further states that *Peter Walden Meyers* departed this life in the month of February, 1837, and that the plaintiff had repeatedly since that date applied to the defendant to account for the third part of the rents received since the death of her husband, and to assign her dower; which applications were refused by the defendant. The bill states a pretence by the defendant that the plaintiff was not entitled to dower, inasmuch as the land was waste at the time of the sale by *Meyers*; and charges that, on the contrary, a mill and other valuable improvements had been erected at the time of that sale, and that the plaintiff is entitled to dower in the lands in their present improved condition.

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Mr. *Adam Henry Meyers*, (who is, as would appear, the solicitor in the cause,) in the affidavit which he has filed in opposition to this motion, avers that the suit was instituted for the benefit of himself, and not of the plaintiff; he discloses the fact that in 1843 he became the purchaser of the plaintiff's right to dower of *all the lands in which her husband was seised during the coverture*, in consideration of an annuity of fifteen pounds per annum, secured by his bond; and he sets forth two instruments constituting his title—one, a letter of attorney, conferring upon *Adam Henry Meyers* very large powers in relation to the plaintiff's right to dower; the other, a separate instrument, purports to certify that *Adam Henry Meyers* had purchased the plaintiff's dower, or right or title to dower, in all the lands which belonged to her late husband, and that all such sum or sums of money as he might obtain by selling or compromising her right to such dower would belong to himself. Both instruments are under seal, and are executed by the plaintiff by affixing her mark.

This, then, is a contract with a solicitor of this court, for the sale to him of a title to dower by a party out of possession, who had never procured the assignment of such dower, notwithstanding the lapse of several years from the accruing of the right. Now, without determining the validity of the contract at this stage of the cause, I think it proper to observe, that I entirely concur in the opinions

expressed by the Court of Queen's Bench on several recent occasions, in giving effect to the statute of Henry VIII., respecting the sale of pretended rights. Although the state of society in which that act originated has happily passed away, and although the particular motives to which it has been attributed may no longer exist, there is yet in our own condition of society, altered and ameliorated though it be, that which amply justifies the provision of the common law rule upon this subject, and calls for the rigid application of the provisions of the statute as imperatively as in the age in which it was enacted. Mr. Hawkins has laid down the principles of the common law upon this subject very clearly. (a) As doctrines of the criminal law, his proposition may be perhaps regarded as too broad; but, as enunciating principles for the guidance of judges sitting here, in determining the fitness or unfitness of giving effect to contracts like the present, they have received the highest sanction. (b) He says: "It seemeth to be a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller does not think it worth his while to do, and on that consideration sells his pretensions at an under rate. And it seemeth not to be material whether the title so sold be a good or a bad one, or whether the seller were in possession or not, unless possession were lawful and uncontested." But if the wisdom and justice of the common law rules upon this subject be apparent, when applied to the sale of an estate, properly so called, under the circumstances alluded to, how absolutely necessary would they seem in regard to contracts such as the present is represented? A sale by a person having no seisin, and incapacitated from performing any act of ownership; a sale, not of an estate but of a naked right, incapable of transfer except by release to the *terre-tenant*, by way of extinguishment; not a sale of even such a right in any particular estate, shortly after its accruer, and for an adequate price: but a sale to a solicitor of this court, by an

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(a) Hawkins' Pleas of the Crown, vol. 1, B. i., ch. 86, sec. 1.

(b) Wood v. Downes, 18 Ves. 120.

1850. illiterate person, of her right to dower in all lands of which her husband had been seised during the coverture, long after the accruer of that right, and at a price not shewn to bear any proportion to the thing sold. I have said, that I do not purpose to settle definitively the rights of these parties at this stage of the cause. But, without determining the judgment which it may be proper to form respecting this transaction, upon its further developement, I am of opinion that, as now presented, it is open to the gravest objections, affecting alike the interests of society and of justice, and the honour of the legal profession, with which these interests are so closely interwoven; (a) and I am of opinion, that under such circumstances, this suit, as at present constituted, cannot be allowed to proceed further. Had this been an action at law for the recovery of this dower, Mrs. *Meyers*, no doubt, must have been the sole plaintiff; but the course of proceeding here is different. The established practice of this court, as stated by Mr. *Calvert*, is, "that all parties having an interest in the object of the suit ought to be made parties." (b) Here Mr. *Meyers* has seen fit to file a bill in the name of a person having no beneficial interest, and who now disclaims the suit, omitting altogether the party really interested; and that in a case where, not only is the assignment questioned as between assignor and assignee, but its validity impugned upon grounds of public policy; thus raising the question whether the agreement be such as this court should assist in enforcing. Had this suit been properly constituted—had the bill been filed by Mr. *Meyers* (the party beneficially interested)—the question now presented for consideration would have been open to all the defendants, (because every defendant is entitled to negative the plaintiff's right of suit,) and we would be then called upon formally to decide whether this transaction is such an one as a court of equity ought to sanction. (c) But by suffering the cause to proceed in its present shape, we may be giving effect to a contract of the most questionable character, and encourag-

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(a) *Harrington v. Long*, 2 M. & K. 590; *Prosser v. Edmonds*, 1 Y. & C. 481.

(b) *Calvert*, 11; *Blake v. Jones*, 3 Ans. 651; *Humble v. Shore*, 3 Hare, 119.

(c) *Fulham v. McCarthy*, 12 Jurist, 757.

ing litigation of the most objectionable kind; contracts so objectionable in their character, and having reference to the condition of property in the province, so liable to abuse, as to appear sufficient to warrant the interference of the legislature, if the established principles of the court shall be found to offer no impediment to their enforcement. I am of opinion, therefore, that this suit has been improperly constituted upon Mr. *Meyers*' own shewing; that Mrs. *Meyers* has not authorised the institution of a suit in which she should appear as the sole plaintiff claiming a beneficial interest on her own behalf; and that she is entitled to have the motion made absolute with costs, without prejudice to any other proceeding which the plaintiff may be advised to institute.

JAMESON, V. C., concurred.

ESTEN, V. C.—In this case, *Adam Henry Meyers*, a solicitor of this court, purchased all the right of dower of the plaintiff in the lands of her late husband, and instituted this suit in her name against the defendant, for the purpose of enforcing that title against part of these lands which he had purchased. The present application is by the plaintiff in the suit against Mr. *Meyers*, who acts as her solicitor, to remove the bill from the files on the ground of its not being authorised by her, of which fact she makes affidavit. In opposition to this motion, Mr. *Meyers* produced the instruments under which he claims the title in question, and which are an assignment of the right, and a power of attorney to proceed in her name for the purpose of enforcing it. The plaintiff impugns the validity of this assignment, and I think it is very proper that this question should be raised and discussed in the suit, which cannot be the case while it remains in its present form. I do not conceive that Mr. *Meyers* has any right to proceed in this court in the sole name of the plaintiff, under the transaction which has taken place between them. It is his duty to appear before the court as the party really interested, in order that the defendant may know with whom he has to deal, and in case the assignment be liable to any objection, that it may be raised and properly discussed. Where a merely equitable interest

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1850. is the subject of assignment, the assignee alone can proceed to reduce it into possession. Where the assignment is of a legal right, but operates only in equity, the assignee is bound to proceed in his own name, either joining the assignor as a co-plaintiff, or making him a defendant. (a) In the present case the court would, I think, be warranted, if necessary, in removing the bill from the files, without prejudice to Mr. *Meyers* commencing another suit in his own name; but I see no objection to his amending the bill by joining himself as a co-plaintiff, or by substituting himself for the plaintiff, as the plaintiff in the suit, and making her a defendant. In any case, Mr. *Meyers* must pay the costs of the defendant *Lake* to the present time; that is the plaintiff should pay them and obtain them from Mr. *Meyers*; but I think Mrs. *Meyers* should not have the costs of the application. If this assignment be invalid, she is *particeps criminis*, although permitted to raise the objection on a principle of public policy; if it be valid, she has authorised Mr. *Meyers* to use her name, although the rules of the court do not permit him to proceed in her name alone; and in either case she has been guilty of a surprise upon the court in applying to have this bill removed from the files, on the ground of not having given any authority to file it, when she ought to have brought the real facts of the case under the notice of the court, in order to enable it to judge whether any such authority had been given or not.

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The order drawn up on this application was :

Order.

"That the bill filed in this cause be taken off the files, and that the costs of filing such bill be paid by Adam Henry Meyers, Esq., the solicitor who filed the same; and it is ordered that it be referred to the master of this court to tax the defendant his costs of this suit up to this day, and of this application, consequent thereon, and also to tax the plaintiff her costs of this application; and it is ordered, that the said Adam Henry Meyers, Esq., do pay to the plaintiff and to the defendant respectively, their said costs when taxed."

(a) *Fulham v. McCarthy*, 12 Jur. 757.

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MCGILL V. SEXTON.

Practice—Costs.

To enforce payment of a solicitor's costs taxed upon the petition of the client, entitled in a cause depending, the proper course, under the 92nd order of V. C. *Jameson's* orders, is by subpoena and attachment, though such costs include costs at law.

When on the taxation of a solicitor's costs, the master, without any order as to the costs of taxation, taxed them and included them in his certificate; and a subpoena and attachment issued in due course for the whole amount included in such certificate, and the client remained in close custody for a considerable time under the attachment, before making any application in regard to the supposed error as to the costs of taxation; the court refused to set aside the subpoena and attachment.

This was an application by the plaintiff to set aside a subpoena and attachment for costs due by him to his solicitor, and to discharge him from arrest under the attachment.

The plaintiff had, on the 13th of October, 1847, obtained the usual order for the taxation of his solicitor's costs in this suit, and in other matters.

On the 29th of February, 1848, the master certified as follows :—

“In pursuance of an order made in this cause, upon the petition of the above named plaintiff, and bearing date the 13th day of October last, whereby it was ordered, amongst other things, that it should be referred to me to tax to *George B. Lyon*, a solicitor of this court, his bill of fees and disbursements and costs, charges and expenses, properly incurred in this suit, and in other matters in which the said *George B. Lyon* has acted as solicitor for him the said plaintiff, I have been attended by the solicitors, as well for the said plaintiff as for the said *George B. Lyon*, and the bill of the said *George B. Lyon* of his fees and disbursements, costs, charges and expenses, in the above suit, amounting to the sum of £34 17s. 4d., I have underrated and taxed at the sum of £29 13s. 6d.; and I find the costs of the said *George B. Lyon*, in a certain suit at law in which one *Robert Birch* was lessor of the plaintiff, and the said *Patrick McGill* was defendant, and in which the said *George B. Lyon* was solicitor for the said *Patrick McGill*, amounting to the sum of £15 4s., and I have taxed to the said *George B. Lyon* his costs upon such taxation aforesaid, and upon taking an account of what is due to the said

Statement.

1850. *George B. Lyon* upon the said bills, at the sum of £4 17s. 8d., amounting in all to the sum of £49 15s. 2d.; and find that several payments have been made by the said plaintiff on account thereof, amounting together to the sum of £15, leaving due to the said *George B. Lyon*, in respect thereof, the sum of £34 15s. 2d., which is to be paid by the said plaintiff *Patrick McGill*, to the said *George B. Lyon*, as by the said order is directed. All which I humbly certify to this honourable court."

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The solicitor then sued out and served a subpoena for £34 15s. 2d., and on the return thereof sued out an attachment for the same sum. Under this attachment the plaintiff was arrested.

Mr. *Mowat*, for the plaintiff, now moved to set aside the subpoena and attachment issued thereon for irregularity, contending that it was not competent for the solicitor to adopt the course that had been here taken to enforce payment of his costs, and cited 1 Smith, C. P. 701. Here, the Argument. subpoena was issued for a sum, including costs of proceedings at common law, as well as of the proceedings in this court. This he contended was clearly irregular, and no precedent could be produced for such a proceeding.

The costs of taxation were also included in the certificate of the master, which could not be done except by consent; and no consent has been shewn to have been given in this instance. If, therefore, the court shall be of opinion that the proceeding by subpoena was a proper course for the solicitor to take, still it having included charges clearly not proper to be included, the court will set it aside.

He referred to *Mortimer v. Piggot*, (a) and *Smith v. Sandys*, (b) to show that plaintiff was still entitled to relief, notwithstanding the delay in applying.

Mr. *Strong*, contra, contended that the proper mode of enforcing payment of the costs taxed in this case was by subpoena. The 92nd order of this court (1st January, 1842) directs "that every person, not being a party in any cause, who has obtained an order, or in whose favour an order shall have been made, shall be entitled to enforce obedience to

(a) 2 D. P. C. 615.

(b) 5 N. & M. 59.

such order by the same process as if he were a party to the cause." Now the proper course for a party to take to enforce payment of costs is by subpœna, and therefore the proceeding taken in this case is that pointed out by the order. On this point he also referred to 1 Smith, C. P. (4th ed.) 104; *Ottey v. Pensam*, (a) *Lane v. Oliver*, (b) and *Ayckbourn's Ch. Pr.* 233, 545.

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As to the irregularity of allowing the costs of taxation in the first instance, that should have been objected to in another way—by petitioning for leave to except to the master's certificate. (c) But if the proper mode of taking the objection has been adopted, then the party should have tendered the amount certified for by the master, less the costs of taxation. *Batt v. Hall*, before Mr. Justice *Sullivan*, in chambers, is an authority directly in point. Again, this motion is made too late, unless indeed the whole proceedings be deemed void, the plaintiff having already applied to this court for relief under the Insolvent Debtor's Act, and allowed the attachment to remain in force for more than a year.

The grounds of the application are more fully set forth in the judgment of the court, which was delivered by

ESTEN, V. C.—In this case the plaintiff obtained an order upon petition for the taxation of his solicitor's bill, which contained charges for business done in this court, and in this suit, and for business done at common law. The master taxed this bill, and also the costs of the reference, and issued his certificate stating that he found due from the plaintiff, to his solicitor, for the costs above mentioned, the sum of £49 14s. 2d., which was composed of the sum of £29. 12s. 6d. for the Chancery costs, the sum of £15 4s. 0d. for the common law costs, and the sum of £4 17s. 8d. the costs of taxation. Upon this certificate a subpœna was obtained and served upon the plaintiff, and a demand of payment made, and, this not having been complied with, an attachment was issued, upon which the plaintiff was arrested and lodged in gaol, where he has continued ever since. The present application is to discharge this subpœna and attach-

Judgment.

(a) 11 L. J. N. S. 97.

(b) 2 Hare. 97.

(c) 3 Danl. C. P. 87.

1850. ment for irregularity, on the following grounds: 1st, that the proper course of proceeding was, according to the former practice, by successive orders and commitment, and not by subpoena and attachment under the 92nd order of this court. 2ndly. That at all events a subpoena and attachment could not issue to compel the payment of costs incurred at common law; and 3rdly, that the certificate, and the subpoena and attachment founded upon it, were irregular and void for including the costs of taxation. The jurisdiction of the court in the taxation of costs between solicitor and client, in this country, appears to rest upon the general power of the court and the statute 2 Geo. II., ch. 23, the statute of the 6 & 7 Vic., ch. 73, not being here in force. The Court of Chancery always had the power to order a solicitor to deliver up papers and documents belonging to his client, in his possession, and, as incidental to that jurisdiction, to direct taxation of the solicitor's bill of costs; because it would not compel him to part with the papers in his possession without payment of what was due to him; for the ascertainment of which taxation was requisite. (a) I think it also extremely probable that the court may have had previously to the passing of the 2 Geo. II., ch. 23, by virtue of its general jurisdiction, power to order the taxation of a solicitor's bill, whenever it contained charges for business done in the court, and there was a cause depending, upon bringing the money into court; but without venturing to express a stronger opinion upon this point, it is certain that, after the passing of that statute, the court had power, whether a suit was depending or not, and without bringing the money into court, to order the taxation of a solicitor's bill at the instance of the client, wherever it contained charges for business done in the court, either alone or jointly with other charges—provided, in the latter case, if the other charges concerned business done in another court, they did not exceed the charges for the business done in the Court of Chancery; and that, if a suit was depending, the order of reference might be, and usually was,

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(a) Re Murray, 1 Russ. 519.

intituled and made in the cause. (a) If a sixth of the bill should be taxed off, the statute directed that the costs of taxation should be paid by the solicitor; if less than a sixth should be taxed off, the court had a discretion to order the payment of the costs of taxation by the client or the solicitor, according to the circumstances. But in practice the rule was to order the client to pay the costs of the taxation, wherever less than a sixth was deducted from the bill; and so regularly did this practice prevail, that either party could obtain an order for the payment of the costs of taxation by the other, according to the event, upon motion or petition, as of course; and if the client desired, notwithstanding less than a sixth was deducted, to be relieved from paying the costs of taxation, he was compelled to make a special application for that purpose. (c) The costs of taxation could in no case be properly included in the certificate, but an order was obtained for the payment of them from the court. The mode of compelling the payment of the amount reported due by the master's certificate, upon the taxation of the solicitor's bill, was as follows: if an amount was reported due to the solicitor, the certificate having been filed and an office copy taken, a copy of the certificate was personally served on the client, the office copy being exhibited at the same time, and a demand of payment made, either personally or under a power of attorney. If this demand was not complied with, a motion was made on notice and affidavit of these facts, that the client might pay within a certain time. Of this order personal service was necessary, and the demand of payment was repeated; and if the amount was not paid, the solicitor moved upon affidavit of these facts, and notice personally served, that the client should pay within four days or stand committed; and upon affidavit of such personal service, demand and non-payment, an order was obtained *ex parte*, that the client should stand committed. The same course was pursued, where the master reported that the solicitor had been overpaid, and that there was a balance due to the client, with the exception that in this case the client served

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Judgment.

(a) *Margerum v. Sandiford*, 3 Br. C. C. 233; 1 Sm. Ch. Pr. 701.

(b) 1 Sm. Ch. Pr. 706.

1850. the solicitor with a copy of the order of reference. This long and circuitous method was formerly resorted to, whether the order of reference was made in a cause or in a matter, and the delay and difficulty attending it was the subject of much complaint. Mr. *Smith*, in the first volume of his book, at page 710, after noticing the case of *Stocken v. Dawson*, where the Master of the Rolls, upon the application of the solicitor, who had an order for the payment of his costs, dispensed with one of the above-mentioned orders, namely, that limiting the time for payment, expresses regret that it was not considered as sanctioned by the authorities, and represents it as most desirable, that the process of contempt for and against persons, not parties to a suit, should be assimilated to that for and against such parties; obviously having in his immediate contemplation the case of the solicitor. Accordingly, in 1841, a general order was issued in England, of which the 92nd order of this court is a transcript, whereby this object was accomplished; and Mr. *Smith* states, in his third edition, vol. 1, page 104, that from that time, either the solicitor or the client could enforce payment of what might be due to him, upon taxation, by subpoena and attachment. And Mr. *Ayckbourn* states in his book, at p. 545, that where the order of taxation is pronounced in a cause, payment is enforced by means of subpoena and attachment; but where in a matter, under the old practice. The reason of this diversity of practice arises from the fact, which has been settled by authority and is indeed sufficiently apparent without it, that these general orders relate only to orders made in a cause. In the present case there is a cause depending, and the order of reference is intituled and made in a cause. It is therefore within the scope of the 92nd order of court. Mr. *Mowat* indeed contended that the reference was in the nature of a suit, and as costs were the subject matter of the demand, the order was analogous to a decree for payment of money; but this distinction, though ingenious, is too refined. It is quite clear that, as there must always be a suit depending to make these orders of court applicable, the solicitor is to be considered for this purpose as a party to such suit, and the order then becomes

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an order for the payment of costs by one party to another, which is confessedly enforced by subpoena and attachment. One of the principal objects of these orders of court was to shorten the process, by compelling payment on the taxation of a solicitor's bill. The first ground relied upon in this motion, therefore, entirely fails; and the second must share the same fate. No doubt can be entertained that, where other business than what had been transacted in the court is included in the bill, the payment of the whole amount is enforced by the same process. Mr. *Smith* says, in vol. 1, p. 697: "If a solicitor delivers a number of bills, in any one of which he makes charges, or even a single charge for business done in this court, the whole may be taxed, all the bills being regarded together as one demand." With respect to the third ground, namely, the costs of taxation being included in the certificate, the rule upon which it proceeds is no doubt correct. These costs ought not to be comprehended in the certificate, but an order for their payment should be obtained on motion or petition, as of course. The certificate in the present case included them improperly, unless by consent.

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It is a common practice, I believe, when the client is to pay the costs of taxation, for the master to tax them, and add them to the amount of the bill by consent. This course is equally advantageous to both parties. Here, not only were these costs taxed and added to the amount of the bill and introduced into the certificate in the presence of both parties, but a subpoena and attachment are issued, and the party, having been arrested, remains in gaol a considerable time without objection. Under these circumstances, I think the court is warranted in presuming consent to the course which was pursued. At all events it must assume that less than a sixth was deducted from the bill, in which case the solicitor was entitled to an order as of course for the payment of the costs of the reference; but instead of obtaining this order, he procures their taxation and introduction into the certificate at the time, and the subpoena issues for the whole amount, for non-payment of which the client is arrested on an attachment. Is this certificate and the sub-

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CHISHOLM V. SHELDON.

Mortgagee of term—Reversioner—Injunction—Waste.

The mortgagee of a term for years being in possession of the mortgaged estate, will, at the suit of the mortgagor, be restrained by injunction from felling timber on the mortgaged premises; although the mortgagee may have obtained the consent of the reversioner to what he is doing.

Quære—Whether the doctrines applicable in England between termor and reversioner, in respect to felling timber, can prevail, as to an estate in this country, the beneficial enjoyment of which is ordinarily attained, and can generally be obtained, only, through the destruction of the growing timber. And whether the doctrines of the common law, as to growing timber, can be applied in all their extent to forest land in this country.

Statement.

After the expression of opinion by the court on the merits in this cause (see ante p. 108,) and the leave then given to amend, the defendant *Sheldon* commenced to fell and convert into firewood the timber growing on the mortgaged premises, and to dispose thereof. The plaintiffs thereupon filed a supplemental bill, stating that fact and praying for, and having filed affidavits of the facts, had obtained a special injunction, on notice, but with leave to the defendants to move to dissolve. This was in consequence of the defendants, at the return of the notice, not being prepared with affidavits to oppose the application. A motion to dissolve the injunction so granted was now made by

Mr. *Turner*, for the defendants, who contended that *Sheldon* had a perfect right to fell the timber in the manner he was doing unless objected to by the owner of the reversion, *Tiffany*; instead of that, *Tiffany* had given his assent

to *Sheldon's* thus disposing of the wood. He submitted, therefore, that the plaintiffs were not entitled to the injunction which had been granted. He referred to 9 Rep. 112; Moore's Cases, 65; 3 Madd. 532; 1 Br. C. C. 159; 17 Ves. 110; 3 B. C. C. 538.

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Mr. *Brough* contra.—The error fallen into by the other side is assimilating the facts of this case, where the parties stand in the relation of mortgagor and mortgagee, to a case between termor and reversioner. *Tiffany* has no power to authorise the felling of the timber in the manner pursued by *Sheldon*; and, therefore the motion, he submitted, must be refused.

THE CHANCELLOR.—After the amendment of the original bill, pursuant to the order made upon the hearing of this cause, the plaintiffs filed their supplemental bill, stating that since the hearing of the cause the defendant *Sheldon* had commenced to fell the timber on the mortgage premises, thereby doing irreparable damage to the estate, inasmuch as the supply of timber was already deficient; and praying an injunction and account. Judgment.

The motion is opposed by the defendants upon numerous authorities, which establish, as they contend, two propositions: first, that an action of waste, and by analogy a bill of this description can only be sustained by the owner of the reversion, to whom the timber belongs as part of the inheritance; or, secondly, that such a proceeding cannot be maintained against the reversioner, who is said to have assented to the waste which has been committed, and who alone has a right to an account of the proceeds of the timber felled.

We are of opinion that these cases have no application. Did this question turn upon the relation between termor and reversioner, and the respective rights and liabilities growing out of the relationship, it would be necessary for us to determine some points of considerable importance. Before proceeding upon the authority of the cases cited, we should have had to consider whether the principles of law, which settle the rights of termor and reversioner in relation to growing timber, would have been regarded in England as

1850. applicable to an estate of this kind, as to which the beneficial enjoyment of the land is ordinarily attained, and indeed can only be attained, through the destruction of the growing timber. We should have had to consider, secondly, whether the doctrines of the common law, as to growing timber, can be applied in all their extent to forest lands in this country. But it will not be necessary for us now to determine either of these points, because we are of opinion that this case turns upon the rights and liabilities growing out of the relationship between mortgagor and mortgagee—in which latter character the defendants entered into possession of the premises; and not upon the law as between termor and reversioner, to which alone the arguments of the defendants were directed. Now that this court, in maintaining the respective rights of mortgagor and mortgagee, is not governed by the strict common law rules in regard to waste, appears no less from what it does than from what it declines to do. It does restrain a mortgagee in possession, after default, from committing waste, and charges him in account with such loss as has arisen from permissive waste. It refuses to restrain the mortgagor upon the application of the mortgagee, with the legal title, unless it is sworn that the acts complained of are likely to render the security insufficient. Upon such principles, a mortgagee under ordinary circumstances would unquestionably be restrained from committing waste by felling timber or otherwise; and those principles apply, we think, with equal force to the case now before us. It would be no less repugnant to reason than unwarranted by authority, to hold that a reversioner, entering into possession as mortgagee, might fell the timber of the estate, because he alone, as reversioner, has a right to complain of such act, and then might further convert such timber to his own use, because, being felled, it belongs to him as the owner of the inheritance, and no man can call upon him to account for that which is his own. Until the reversion comes into possession, these defendants hold the estate only in the character of mortgagees; and as they are entitled to assert the rights, so are they subject to the liabilities of persons holding under that title.

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It may be argued, however, that a mortgagee in possession must be held entitled to do such acts as are indispensable to the present enjoyment of the estate. That is a question of considerable importance, and some difficulty. There is great force in the argument, that the mortgagee, so long as he holds the estate merely as a pledge, although entitled to the possession and enjoyment of it in its then condition, can have no right to alter its condition with a view to some further enjoyment in a different state—that if a mortgagee desire to deal with the estate as his absolute property, he must make it such by foreclosure; but until that event, must so deal with the pledge as to be enabled to restore it in the same plight in which he received it. We are of opinion, however, that the question does not arise here, for the estate was clearly capable of beneficial enjoyment without cutting any growing timber. The affidavit of one of the defendants shews that the quantity of timber on the estate is small, that its preservation is important, and that such as has been cut was not to be consumed on the premises, but elsewhere. That is clearly unwarrantable.

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We are not disposed to restrain the defendant from removing such portion of the timber as has been already converted into firewood; indeed the greater part, if not the whole, has been removed, so far as we can gather. But without deciding the point, we are disposed to consider the plaintiff entitled to an account, whether the felling of this timber be or be not waste, as between termor and reversioner. The termor is responsible to the reversioner for all waste committed even by a stranger, the termor himself having his remedy over against the party committing the waste. Now, if the felling of the timber be not waste—that is, assuming the trees to be such as the termor might have cut—then the right to an account is apparent. On the other hand, if it be waste, then we think that the right of the plaintiffs to the present enjoyment, and their responsibility to the reversioner entitle them to an account from this mortgagee.

The plaintiffs ask for an injunction as against all the defendants; and some question has been made, whether it

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can properly be extended beyond the acts of *Sheldon*. It is one of the peculiarities of the case, that it is very difficult to discover in whom the beneficial interest is really vested. We said at the hearing, that it is not very easy to reconcile the statements in the case with each other, or with the facts. Very much was said about the rights of *Smith* and *Tiffany*, but in the affidavit, the property is treated throughout as the property of *Sheldon*; indeed, he says in express terms that he has for many years considered the farm as his own property. On the argument, too, it was urged that the injunction ought not to be granted, because the reversioner sanctioned the acts complained of. That can hardly be regarded as a reason for refusing the injunction, although it may be a very sufficient one for granting it. On the whole, we think that the parties have so dealt with the estate as to make it proper that the injunction should be granted against all. But under the circumstances, we do not think it is a case for costs.

Judgment. JAMESON, V. C., concurred.

ESTEN, V. C.—In this case I understood it to have appeared to the court at the hearing of the original cause, on which occasion I took no part, having been concerned as counsel for some of the defendants in the original cause; that a mortgage had been made of the lands in question in the cause by the then owner of the fee simple of the property, to the defendant *Wm. Bull Sheldon*, for the term of 1000 years, for securing the sum of £625 and interest; that the reversion in fee in the lands, and the equity of redemption on the mortgage, became vested in *Wm. Chisholm*, the testator in the pleadings named, who, as it appears, made his will in the year 1841, executed and attested in manner required by law, for devises of freehold estates, and thereby devised all his real estate as to one-third to his wife for her own use, and as to the other two-thirds, for the maintenance of his family and payment of his debts, until his youngest child should attain the age of twenty-one years, and after that time to his wife and children, who, if sons, should attain the age of twenty-one years, or if daughters, should attain the age of eighteen years, in equal shares, to be divided amongst

them by his executors; that *William Chisholm* died in 1842, without having altered or revoked his will; that the defendant *Sheldon* had been in possession of the premises since the year 1827; that some time after the death of *Wm. Chisholm*, the defendant *Tiffany* had purchased the reversion in fee of the lands in question, at sheriff's sale, under a writ against the lands which were of *William Chisholm* at the time of his death; that all the estate and interest of *Wm. Chisholm*, in the lands in question, had accordingly been conveyed to him by the sheriff, so far as he had authority to make such conveyance, and that the defendants were then in possession. These facts, I understand, were not disputed between the parties. An objection was made at the hearing of the original cause for want of parties, but the hearing proceeded, and the cause was fully argued and heard upon the merits, and undoubtedly, if the court had thought the record properly constituted, it would, upon that occasion, have pronounced judgment in favour of the plaintiff. What it did was to make an order for the plaintiff to amend his bill by making parties plaintiffs or defendants, as he should be advised, with liberty to exhibit an interrogatory for the purpose of proving the will of *Wm. Chisholm*. In considering the course to be adopted on this occasion, the court found it necessary to form, and did in fact form and express an opinion upon the case, which was strong and decided, although it did not pronounce a decision which would preclude it from exercising an unfettered judgment, when the cause should again be brought to a hearing. Upon the strength of this opinion, however, the court made the order which I have mentioned; and therefore, I consider, that for the purposes of this application, the matter has passed in *rem judicatam*, and that the character of the defendants is established as mortgagees in possession, and that the equity of redemption belongs to the plaintiffs, or one of them. This fact the defendant cannot be considered now as disputing. The supplemental bill incorporates the amended bill; and the title of the plaintiffs, except so far as it depends upon the will of *William Chisholm*, must be deemed to be established by the plead-

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ings and evidence in the original cause. The execution and contents of the will are verified upon this application by the affidavit of *Wm. K. Chisholm*. Under these circumstances it is impossible to consider this case as one, in which the title is in dispute, and therefore one objection, which was raised against this application by the defendants, must fail. It was then argued, that the defendant *Tiffany*, who has the reversion in fee in the lands in question, consented to the waste complained of, and that thereby it became justifiable and proper; and much learning was expended by the defendants' counsel in shewing the respective rights of termor and reversioner, with respect to the timber on the lands in which their estates respectively exist. The fallacy of the argument, however, consisted in applying this learning to a relation to which it was not in fact applicable. The mistake was in viewing these parties as termor and reversioner, instead of as mortgagor, and mortgagee. The ownership of the lands, in the opinion of the court, is in this state. An absolute term of one thousand years is vested in the plaintiffs, subject to a mortgage of that term in the defendants; in other words, a legal term of one thousand years is vested in the defendants by way of mortgage, the equity of redemption of this term is vested in the plaintiffs, and the reversion in fee severed from the equity of redemption of the term is vested in the defendant *Tiffany*. The term is in the same state as if the equity of redemption had become extinct by foreclosure.

Judgment.

Now, suppose a mortgage term of a thousand years to have become absolute by foreclosure, and to be afterwards mortgaged to another person, who enters into possession. It may be true that the mortgagor has no interest in the timber, but only a right of enjoyment; and yet it cannot be doubted that if the mortgagee in possession attempted to fell timber, he would be restrained at the suit of the mortgagor. In fact, this very point has been determined. In the case of *Farrant v. Lovel*, (a) cited in the argument, one of the resolutions was, that if the owner of the fee make a mortgage for a term of years, and continue in possession

(a) 3 Atk. 723.

and commit waste, the mortgagee can have him enjoined ; 1850.
 and at page 210 of the same book, in the case of *Robinson v. Litton*, there reported, it was held that a tenant for years, at a ground rent, was entitled to restrain his underlessee in like manner. Supposing, therefore, the plaintiffs to have no interest in the timber, but only a right of enjoyment, it is quite clear that as between them and the defendants, considered as mortgagees in possession, they would be entitled to an injunction. If such be the case, can the consent of the reversioner make any difference ? Certainly not. The plaintiffs have a right to restrain the commission of waste as against their own mortgagees, and they cannot be deprived of this right by the act of a third person without their consent. They are not trustees of this right for the reversioner, but enjoy it for their own benefit ; and if the reversioner himself entered into possession either by license of the mortgagee or under an assignment of the mortgage, he would be subject to the same obligations and liabilities as the person under whom he claimed. There is no doubt, therefore, that, as an abstract principle, the owner of a term of years, who has mortgaged it, may restrain his mortgagee being in possession from felling timber, although he may have obtained the consent of the reversioner to it. If the plaintiffs have not only a right of enjoyment as to the timber, but also power to fell it and convert it to their own use, their title to an injunction is stronger, but not more clear or decided. This question it is not necessary to decide upon the present occasion ; for admitting that the plaintiffs, as the absolute owners of a term of one thousand years, have, as against the reversioner, a right to fell forest trees the original growth of the country, the defendants, as mortgagees, could not claim this right as against the plaintiffs, until foreclosure. This I apprehend to be the settled law of the court upon mortgages in fee, and the same rule must apply to a term of years assigned by way of mortgage, supposing the right to fell timber to exist at all.

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With regard to the facts of this case, it is clear that when the defendant *Sheldon* entered into possession in 1827, only thirty-eight acres of woodland remained out of one hundred

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and seventy acres. From this he has withdrawn about twenty cords annually ever since; and in the month of January, in the present year, thirty cords, for consumption, not upon the premises, but at his residence in the town of Hamilton. He has been requested to desist, and refused; and it appears that no more timber remains than it is desirable should be on a farm. Under these circumstances, I think it is reasonable and proper that an injunction should be awarded to restrain the felling of more timber than may be required for necessary and proper use on the farm. Whether the plaintiffs are entitled to an account of that which has been already felled, it is unnecessary now to discuss: nor do I think it proper that the injunction should be extended to the timber which has been felled, and remains on the premises; for if it is the property of the reversioner—then of course the plaintiffs are not entitled to an account of it: and even if the plaintiffs are entitled to it as their own property, it is better that the mortgagee should use it and account for it, than that it should decay on the premises, which would be the consequence of including it in the injunction, inasmuch as the plaintiffs cannot take possession or make any use of it. In respect to the persons against whom the injunction is to be awarded, the defendant *Sheldon* is the only person who is mentioned in the affidavits as directing or sanctioning the acts complained of; but if it appears from the pleadings and evidence in the original cause, that all the defendants are in possession, they must be considered as permitting the acts, and should therefore be included in the injunction. I do not think that the plaintiffs should have the costs of this application. Admitting that an application may have been made to the defendant *Sheldon* to desist from felling the timber, with which he refused to comply, it was too much to expect from him that he should at once, without perhaps fully understanding the effect of what had been done at the hearing of the cause, abstain from doing what he had continually done without objection during the whole period of his possession.

HAMILTON V. STREET.

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Practice—Production of documents—Counsel's opinion.

Where the plaintiff had given a mortgage on a steamboat, and the mortgagee afterwards sold the vessel, and the question was whether he was to be charged with the amount of the purchase money, or merely with certain securities received on the sale in lieu of such amount, the defendant (the mortgagee's executor) admitted the possession of a copy of a letter from the mortgagee, refusing to join in the sale, and an opinion of counsel relating to the same matter, but alleged that these documents did "*not relate to the plaintiff's title, or the case made by the bill*"—*Held*, that the plaintiff was entitled to production, as the plaintiff's case and that of the defendant were, under the circumstances stated, so interwoven and inseparably connected that nothing could relate to the one without also relating to the other.

The facts of the case are fully stated in the judgment of the court.

Mr. *McDonald*, upon the coming in of the answer, moved for the production of several books and documents, admitted by the defendant to be in his possession. The defendant offers to produce all except two, viz., a letter from the late *Samuel Street*, Esq., to counsel, and the opinion of counsel thereon. Now *Street* is proceeded against as our trustee, and the letter referred to is *Street's* own statement of his rights in the matter, as such trustee, and asking what his liabilities were in the matter. There can be no good ground for permitting the defendant to withhold this evidence, any more than any other.

Statement.

The statement of the case was made, and the opinion obtained before any idea was entertained of instituting these proceedings. *Smith v. Duke of Beaufort*, (a) and 3 Daniel's Chancery Practice, 2052, were cited.

Mr. *Brough*, contra. The only relationship of trustee and *cestui que trust*, in the transactions set forth in the plaintiff's bill, is that arising from the character of mortgagor and mortgagee. The statement in the answer is sufficient to protect the documents sought to be produced. He referred to 2 Daniel's C. P. 681.

THE CHANCELLOR.—This is a motion for the production of certain deeds, letters, and an opinion of counsel admitted by the answer of the defendant *Street* to be in his custody. The bill is for an account and redemption of certain lands conveyed by the plaintiff to the late *Samuel Street*. It appears that the plaintiff, being desirous of obtaining a loan

(a) 1 Hare, 507.

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for the purpose of purchasing a steamboat, in the year, 1834, applied to Mr. *Street*, who consented to make the advance upon the security of certain lands belonging to the plaintiff. The deeds executed for the purpose of carrying out this arrangement were in form absolute conveyances, but a memorandum was signed by Mr. *Street*, which stated the nature of the transaction. The sum then advanced to the plaintiff was about £3000; but the plaintiff having subsequently assigned two-thirds of the vessel to Messrs. *Hamilton* and *Cummings* these gentlemen re-paid to Mr. *Street* a proportionate share of the loan, leaving the plaintiff's debt about £1000. Not long after this transaction, and sometime during the course of the same year, the plaintiff requiring a further loan, for the purpose of improving the machinery of the said steam vessel, Mr. *Street* consented to make the requisite advance, upon having an assignment of the plaintiff's share in the vessel. This assignment was also absolute, but like the former, accompanied with a memorandum allowing the plaintiff a right to redeem. The mode of employing this vessel, and the custody in which she was placed, does not distinctly appear. But it is alleged that some time during the year 1837, *Street*, *Cummings* and *James Hamilton*, sold the vessel to certain parties for the sum of £9000; as the plaintiff asserts, without his privity or consent; and in the year 1839, the same parties, as the plaintiff also alleges, assigned to one *Drew* all the securities, consisting of a mortgage and several promissory notes which had been taken from the vendee to secure the purchase money. This last assignment was made confessedly whilst the plaintiff was absent from the province and without his knowledge or consent, and it is in relation to it that the letters were written and the opinion taken, which the defendant is now required to produce.

The case made by the bill, so far as it is material to our present purpose, is, that *Street* has so dealt with the plaintiff's share in this steamboat, that he should be charged with whatever loss may have arisen from the non-payment of the purchase money; and no doubt can exist, I think, that the letter and opinion may be very material to that case.

The papers which the plaintiff asks to have produced consist of three classes: the mortgage deeds, if I may be allowed the expression, executed for securing the original loan; the letter to *James Hamilton*, and the opinion of counsel. The learned counsel for the defendant, although he does not consent to produce the deeds, leaves the court to make such order as the admissions in the pleadings may warrant; but as to the letter and opinion, he alleges that their relevancy has been denied by the answer, and that the motion must on that account be refused.

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Applications of this sort have recently given rise to much interesting discussion, which shews that, in England, considerable difference of opinion exists, upon the abstract question at least, and that some points of great practical importance remain as yet undetermined. But without pronouncing any opinion upon the abstract question, whether the privilege allowed to professional communications be against principle, as contended for by Lord *Langdale*, (a) and so to be restricted within the narrowest limits consistently with decided cases; or whether it be in accordance with reason and justice, and so to be extended and enlarged, or at least not narrowed within the limits prescribed by Lord *Brougham*, as argued by Lord *Cottenham*, and the Vice-Chancellor *Wigram*, (b) I say that without pronouncing any opinion upon that abstract question, enough may be found in the judgments of all those learned judges to guide us in the case now under consideration.

Judgment.

The production of documents, ordered upon applications of this nature, is a portion of the discovery to which every plaintiff in the court is entitled. It is afforded in this form, according to present practice, for convenience merely; this proceeding having been found more appropriate than exceptions to the answer, in the place of which it has been adopted. Now it is well settled that every defendant, as a general rule, is bound to discover all the facts within his

(a) *Flight v. Robinson*, 8 Beav. 22; *Greenlaw v. King*, 1 Beav. 137; *Nias v. North & East Railroad Company*, 2 Keen 79; *Storey v. Lord George Lennox*, 1 Keen, 341.

(b) *Woods v. Woods*, 4 Hare, 83; *Lord Walsingham v. Goodricke, Bart.*, 3 Hare, 122; *Holmes v. Badeley*, 6 Beav. 521; *S. C.* 1 Phil. 476.

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knowledge, and to produce all documents in his possession, which are material to the case of the plaintiff; he must set forth all he knows, believes, or thinks, in relation to the matter in question. Or, as the proposition has been accurately stated by Sir *James Wigram*, in his lucid exposition of the law of discovery, "It is the right, as a general rule, of a plaintiff in equity, to examine the defendant upon oath as to all matters of fact, which being well pleaded in the bill, are material to the proof of the plaintiff's case, and which the defendant does not by his form of pleading admit." It is true that the plaintiff must shew, from the answer, that the specific documents are in the defendant's custody, and are relevant. This necessity of producing an admission of relevancy in the answer would seem to make the plaintiff's right to discovery, to a very important extent, dependent upon the defendant's oath; but upon reflection, it will be seen that this is necessary; without such a rule (and it is confessedly liable to abuse) a defendant would be without protection, and all his muniments might be open to a plaintiff having in truth no case against him. But the denial of relevancy in the answer is not absolutely conclusive. It is treated by the court as any other evidence. To prevail it must be a credible denial. And although a credible denial of relevancy, where there is nothing to impeach the credit due to the defendant's oath, must prevail; still, when the answer is equivocal or evasive, it will not be considered sufficient to protect the defendant's documents. But the protection of the documents and their relevancy being admitted, the defendant is bound to bring himself, by clear and precise statement, within some of those cases to which the right of discovery does not extend, and failing to do so, the production will be ordered.

Now, to apply these principles to the present case, it is, I presume, clear that a mortgagee is not bound to produce his mortgage deed, until the mortgagor appears with the principal and interest in his hand. (a) Had this defendant claimed protection for the deeds, or had he, without any such claim, simply stated them to be in his custody, it is

(a) *Brown v. Lockhart*, 10 Sim. 425.

probable that this motion would to that extent at least have been refused. But he has not pursued that course. In his answer to the usual interrogatories, he enumerates the various documents in his custody, including these deeds, and adds this passage: "but which last two documents, this defendant submits, the said plaintiff is not entitled to have produced, inasmuch as they do not relate to the title of the plaintiff or the case made by his bill." I cannot but regard this as a submission to produce the deeds in question. He not only does not claim to have those deeds protected, but admits the plaintiff's right to their production. I am of opinion therefore that the motion must be granted to that extent, without question.

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With respect to the letter and opinion of counsel, a question similar to those recently discussed in England, to which I have referred, might have arisen here, had the defendant claimed protection for these documents on the ground of professional confidence, and had he, by his answer, brought himself within that class of cases where the plaintiff's right of discovery has been denied. But he has neither brought himself within any of the decided cases, nor does he claim protection on any such ground. If therefore we refuse this motion, it can only be because the answer denies the relevancy of the documents in question. But *Smith v. Duke of Beaufort* (a) is a very clear authority to shew that the denial in this answer is not sufficient. In the case to which I have alluded, the answer averred that the documents in question "did not in any manner evidence or relate to any estate, right or title whatsoever, of or belonging to or claimed by the plaintiff, nor were the same in any way material or necessary to or for the plaintiff's defence in the action, nor had the plaintiff any interest whatsoever in the same, or any of them." This was held not to be sufficiently precise, and production was ordered. Now laying aside the fact that, in this case, the same paragraph which denies the relevancy of these documents, in the words I have cited, admits facts shewing them to be relevant; apart from that consideration, the form of denial in the case is obvi-

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(a) 1 Hare, 507.

1850. ously wanting in the necessary precision. It is open to many of the observations applied to the denial in *Smith v. Duke of Beaufort*, and to others which would not have been applicable there. I am of opinion, therefore, that the motion must be granted (a).

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JAMESON, V. C., concurred.

Judgment.

ESTEN, V. C.—This was an application for the production of certain papers and documents, admitted by the defendant in his answer to be in his possession. I think that the defendant submits to the production of all but two—respecting which alone, therefore, any question arises. These are a copy of a letter addressed by his testator to Mr. *James Hamilton*, refusing to join in the sale of the property, which is in question in the suit, to one *Drew*, (which sale is mentioned in the bill,) and an opinion of counsel relating to the same matter. The answer admits the possession of these documents, but insists that the plaintiff is not entitled to their production, inasmuch as “they do not relate to the plaintiff’s title or the case made by the bill.” That they relate to one of the matters mentioned in the bill is clear, because they relate to the sale to *Drew*, and therefore *prima facie* the plaintiff would be entitled to their production. The question is, whether the defendant has stated sufficient to withdraw them from the operation of the general rule. If a defendant state in his answer that documents in his possession relating to the matters mentioned in the bill support his own title, and do not support that of the plaintiff, either directly or indirectly by negating his own, where the failure of his own title constitutes title in the plaintiff, the production will not be ordered; unless the court perceives from the context of the answer or the nature of the case, that the defendant has misconceived the character of the documents in question; and that they are or may be in fact material to the plaintiff, although the defendant has denied such to be the case. In the present instance the defendant has denied that the documents in question relate to the plaintiff’s case; from which I suppose we are bound to infer that they relate to his own: and the nature of the

(a) *Reece v. Try*, 9 Beav. 317; *Beadon v. King*, 13 Jurist, 550.

case is such, that I do not think it is possible for them to relate to the defendant's case, without also relating to that of the plaintiff. Their bearing or effect on that case is quite another question, and of that the plaintiff himself is entitled to be the sole judge. The plaintiff's title or case, is to charge the defendant with a certain amount of money, the produce of the sale in question; the defendant's is to compel the plaintiff to accept certain property received in that sale in lieu of such amount. Now, it must be evident that these opposite titles or cases are so interwoven and inseparably connected, that nothing can relate to one without also relating to the other. On this ground I should be disposed to order the production of these documents; but the defendant should, I think, be allowed to shew by affidavit, that they are not of such a nature as to render them liable to production and inspection on behalf of the plaintiff (a).

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Judgment.

MCKAY V. FARISH.

Assignment for benefit of creditors.

Certain creditors, with the concurrence of the debtor and after notice of an assignment by him of every thing for the benefit of all his creditors *pari passu*, entered up a judgment against the debtor, issued execution thereon, seized goods and chattels of the debtor which were covered by the assignment, and refused to execute the assignment or have any thing to do with it; and it having been subsequently decided upon an issue, under the interpleader act, that the assignment was a valid instrument, and that they therefore could not hold the goods under their execution, they became desirous of ranking as creditors under the deed, and the trustee refusing after what had taken place, to consent to this, and having divided most of the trust funds among the other creditors, the excluded creditors filed a bill to have the benefit of the deed, the debtor being willing; and on the coming in of the answers, moved for payment into court of the balance in the trustee's hands, which still remained unappropriated; but the court considered the plaintiff's equity as so doubtful, under these circumstances, that they refused the motion with costs.

The bill, in this case, stated in substance, that on the 16th December, 1847, *Wm. McKay*, one of the defendants, executed a confession of judgment to two of the plaintiffs, (*Robert and J. D. McKay*,) for the amount due from *William*, to all the plaintiffs and some of the defendants, but not including the debts due to *Farish & Co.*, whose debt was large, or to some of the other defendants, whose debts

(a) *Smith v. Duke of Beaufort*, 1 Hare, 507; *Llewellyn v. Badeley*, ib. 527; *Bolton v. Corporation of Liverpool*, 3 Sim. 467; S.C. 1 M. & K. 88.

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amounted together to about £2,500; that on the 19th of February, 1848, *Farish and Company* assigned all their assets to trustees for the benefit of their creditors; that on the 6th March, *Wm. McKay* executed an assignment to *Farish* and *Robert McKay*, of all his assets, for the benefit of all his creditors, *pari passu*, the deed containing the usual release from the executing creditors of the several debts set opposite to their respective names; that *Farish* executed this deed on the 6th March, and one of his trustees on the 7th March; that it was never executed by *Farish & Co.*'s other trustees; that until after the judgment of the Court of Queen's Bench was pronounced, as thereafter mentioned in favour of the validity of the deed, no one executed the assignment—except the defendant *Farish* and his partner, and one of their trustees—and that no sum had ever been set opposite the name of any of the creditors who had executed it; that the plaintiffs were applied to by the attorney for *Farish*, a day or two after the execution of the deed by the debtor, to become parties thereto, and execute the same, which the plaintiffs, being advised that the same was not a complete or valid instrument, refused to do; that they procured judgment to be entered upon their confession on the 7th March; that on the 8th the goods and chattels embraced in the assignment, being still in the possession of *Wm. McKay*, were seized under the execution issued upon this judgment; that *Farish* claiming them as trustee under the deed, and the plaintiffs insisting that the deed was not, under the circumstances stated, a valid instrument, the sheriff obtained from a judge of the Court of Queen's Bench a summons, calling upon the parties to interplead—that an issue was directed, and a trial thereon had, and judgment given for *Farish*, and the said instrument pronounced a valid conveyance, which judgment was thenceforward acquiesced in by the plaintiffs; that save as aforesaid, the plaintiffs never took any steps to enforce their judgment against *Wm. McKay*, or against any goods, chattels or other things of his, and never intended to do so, and that all their proceedings, in respect thereof, had been taken with the full concurrence and

approbation of *Wm. McKay*; that after the judgment was given, the other defendants were allowed, by *Farish*, to execute the trust deed; that he had divided among them part of the assets he had received, but a balance remained in his hands undivided; that the plaintiffs had, since the judgment against them, applied to come in under the trust deed, but *Farish* refused to consent thereto, pretending that under the circumstances the plaintiffs had precluded themselves from the right or privilege of executing the deed, or obtaining any benefit under the same; and the plaintiffs charged that, since the deed was found and declared to be a valid instrument as aforesaid, *Wm. McKay* had always been willing and desirous that plaintiffs should execute the deed and have the benefit of it, of which *Farish* had always been well aware. The prayer was for leave to execute and obtain the benefit of the deed; for the administration of the trust, and for an injunction and receiver.

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To this bill *Farish* put in an answer, admitting substantially such of the statements in the bill as are above set forth; and setting forth with some minuteness what was said by the plaintiffs on being applied to, to execute the deed, and also what was sworn to by several of them in affidavits filed on the summons to interplead. Statement.

That he first applied, on the 7th March, to *Robert McKay* to execute the deed; that *Robert McKay* declined to do so then, saying that he would do nothing until his partner returned from Guelph, whither he had gone that day to see *William McKay*; that other of the plaintiffs were called on the same day, and such of them as the defendant saw refused to execute the deed then, or say whether they would do so subsequently; that on the 9th or 10th of March *Farish* and his attorney again applied to *Robert McKay*, to execute the deed, and he having, as defendant supposed, consulted with his partner since the first application to him, refused to execute the deed, either as a creditor or as a trustee named in the deed, and said he would have nothing to do with it; that he and his partner held a confession of judgment which they had taken proceedings upon, and that they would abide by it and utterly repudiate the said deed; that

1850. on the same day *Farish* applied to *James Cummings*, another of the plaintiffs, to execute and become a party to the deed, and *Cummings* peremptorily and absolutely refused to execute or become a party thereto, or to have any thing to do with it, and utterly repudiated the same; and then stated that he was also protected by the said confession of judgment. That on the same day *Farish* called upon one or other of the partners in all the other firms to which the plaintiffs belonged, and like answers were returned by all; that none of the plaintiffs, at the time of such applications, refused to execute the deed on the ground that they were advised it was not valid, but they refused on the ground that they held the said confession, and had taken proceedings under it, and they insisted that they were safe under it, and would not therefore execute the deed or assent thereto.

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From the affidavits filed by some of the plaintiffs, on the summons to interplead as set forth in the answer, it appeared that *Robert McKay* swore, that on the second application referred to, he positively refused either to act as assignee, or to consent to such assignment as a creditor, and that each of three other creditors swore, that on his own behalf, and that of his partners, he had declined to become a party to, or otherwise to ratify such assignment, and the answer insisted that the plaintiffs thereby precluded themselves from afterwards coming "*in to claim the benefit of the dead.*" The answer stated, that when the sheriff seized, *Wm. McKay* was in possession as agent for *Farish*, and by express agreement between them to that effect, after the deed had been delivered to *Farish*, as and for a delivery of all the goods and chattels mentioned therein.

The plaintiffs now moved, upon the facts admitted by the answer, that *Farish* should pay into court the sum of £136 5s., the balance admitted by him to be in his hands, belonging to *Wm. McKay's* estate, and that an injunction should issue restraining him from paying over, or distributing without further order, any of the money now in his hands, or which he should hereafter receive on account of the estate.

Mr. *Mowat*, for the plaintiffs.—It is clear that a creditor, under a commission in bankruptcy, may prove, after making

and failing in every effort to set aside the commission. The only exception is, where he arrests the bankrupt on a *ca. sa.*, after the commission issues, for that was regarded as a satisfaction of the debt.—*Ex parte Arundel.* (a) What difference in principle is there, as regards a creditor in such circumstances, between an assignment by operation of the bankrupt law, and an assignment by the voluntary act of the debtor? So also, an heir at law may dispute and repudiate a will, and, after failing in his endeavours to set it aside, claim under it any interest in real or personal estate which it may give him. It has even been doubted how far a condition annexed to a provision for the heir, that he should not dispute the will, is valid.—*Cooke v. Turner*, (b) *Sterling v. Levingston.* (c) Devisees under inconsistent wills are equally unprejudiced by an unsuccessful attack upon the unfavourable will. So a creditor who insists on an usurious security which has been substituted for another, that is not liable to such an objection, may, on failing to establish the second, fall back upon the original security. A principal unsuccessfully denying and litigating an agent's authority, may then insist upon it. A landlord by unsuccessfully disputing the validity of a lease, does not preclude himself from subsequently claiming the rent under it. In administration suits, creditors may come in and have the benefit of the decree, though they have proceeded at law after notice of it. Again, in cases of election, the party has always a right, before electing, to know the value of the interests between which he is to elect; and here it was quite uncertain what the mutual relations of the parties were, until the point was decided at law. Indeed, the judgment at law shews that the plaintiffs were under a misconception, as to their rights, when they declined to execute the trust deed. They supposed it was not valid, and that their writ of *feri facias* would hold the goods; many authorities shew, that an election made under such circumstances is not binding.—*Dillon v. Parker.* (d) "A party can never be held by a court to have made an election,

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(a) 18 Ves. 231.

(c) 15 Sim. 619, note.

(b) 14 Law Times, 413.

(d) 1 Swans. 381, note.

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and to be bound by it, when it is not clear that he was fully apprised of the nature and extent of his own rights as well as those of the person claiming against him.”—*Edwards v. Morgan*; (a) *Brice v. Brice*. (b) The doctrine of courts of equity is not forfeiture, but compensation. Here the plaintiffs come during the life-time of the debtor; since he executed the deed they have taken no step against his person, nor against any property protected by the trust deed; their delay in executing the deed, and their opposition to it, were, in fact, with the debtor’s concurrence and approbation; they are still in a position to pay the consideration for which the debtor stipulated by the deed—a release; and the debtor is perfectly willing to receive it now; the release is for the benefit of the debtor, and he may waive, and does waive any objection arising from not having had it before. All these circumstances distinguish this case from *Field v. Lord Donoughmore*, upon which the trustee relies, and also *Lane v. Husband*, (c) *Stephenson v. Hayward*, (d) is a direct authority for the plaintiffs. In *Johnson v. Kershaw*, (e) the creditors were to come in within three months; and *Knight Bruce*, V. C., said: “who actively refuses and does not retract the refusal within that time.” Now here no time is limited, and it will not be contended that the plaintiffs are too late in point of time; the case cited is therefore an authority, that though the plaintiffs “actively refused” they are at liberty to “retract that refusal,” as they now desire to do.

Mr. *Vankoughnet* and Mr. *Read*, for the defendant *Farish*, relied on *Field v. Lord Donoughmore*, (f) and the line of argument afterwards adopted by the Chancellor in the present case.

THE CHANCELLOR.—This is an application for the payment into court of a large sum of money, which the defendant *Farish* has, by his answer, admitted to be in his hands. It appears from the pleadings, that the defendant *William McKay*, having become indebted in the course of his business to the various parties, plaintiff and defendant, executed

(a) 13 Pri. 786.
(d) Prac. Ch. 310.

(b) 2 Mol. 22.
(e) De G. & S. 260.

(c) 14 Sim. 656.
(f) 1 D. & W. 227.

a confession of judgment, in the month of December, 1847, 1850.
 in favour of *Robert McKay* and *James Daniel McKay*, two
 of the plaintiffs in this suit. The precise amount stated in
 this instrument is not mentioned; but it appears that the
 sum confessed to be due was not in fact due to *Robert*
McKay and *James Daniel McKay*, but comprised all the
 debts of *William McKay* except only that due to *James*
 and *Catherine Farish*, as surviving partners of *Farish, Sons*
& Co.; and, with this single exception, the intention seems
 to have been to constitute the *McKays* trustees for the
 general body of creditors. The debt due to the *Farishes*
 was very considerable, equal to, if it did not exceed, the
 amount due to all the other creditors; yet they were not
 only excluded from the benefit of the security, but left in
 ignorance of its existence for some months. No very satis-
 factory explanation has been furnished as to the objects or
 motives of the parties in pursuing this course; but in the
 month of March following, the *Farishes*, having been then
 for the first time apprised of this arrangement, applied to
William McKay to make an assignment of his estate to
 trustees in trust for all his creditors, *pari passu*, without
 distinction or exception. To this proposal *McKay*, after
 some objection and hesitation, which it is not material now
 to notice, assented; and an indenture was executed upon
 the 6th day of that month between *William McKay* of the
 first part, *James Farish* and *Robert McKay* of the second
 part, and the several other persons whose names and seals
 should be thereto affixed, creditors of the said *Wm. McKay*
 of the third part; whereby *William McKay*, in considera-
 tion of the release thereafter contained, and of five
 shillings, assigned his stock-in-trade, and, so far as we are
 informed, all his personal estate, to the parties of the second
 part, in trust, to pay the creditors who should execute the
 deed *pari passu*, without preference or priority, and to hand
 over the surplus, if any, to *William McKay*. This deed
 does not limit any time for its execution, nor does it contain
 any stipulation for its avoidance in the event of any number
 of creditors refusing to accept of its provisions; but those
 who execute it thereby release all further claim, and the

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1850. trust is for their benefit without further condition. This instrument was executed by *Wm. McKay*, and by *James Farish*, one of the trustees, on the day it bears date, and by *John Young*, one of the assignees of the estate of *Farish, Sons & Co.*, upon the day following; *Robert McKay*, however, as also the other parties complainant, not only did not execute but altogether repudiated it, electing to rely for their security upon the confession of judgment above referred to. Judgment was entered up upon this security on the 7th of March, and on the day following all the goods and chattels comprised in the indenture of the 6th were seized, under the execution issued upon the judgment, by the proper sheriff, who, finding the property claimed by *Farish* as trustee, applied to the Court of Queen's Bench for the purpose of compelling the parties to interplead. Upon the hearing of the summons issued for that purpose, several of the parties complainant, if not all of them, filed affidavits for the purpose of establishing the right of the execution creditors; and all the parties filing such affidavits disclaimed the benefit intended for them by the said indenture. An issue was ordered by the learned judge who heard the application; and upon the trial thereof, the execution creditors impeached the indenture of the 6th March, as well on account of some defects apparent upon the face of the instrument, as by reason of circumstances said to have taken place at the time of its execution, which they endeavoured to establish by evidence. This litigation resulted in favour of the claimants under the deed of assignment; and after the judgment of the Court of Queen's Bench upon the points of law reserved upon the trial, and on or about the 28th day of June, 1849, the parties complainant applied to the trustees to be permitted to execute the deed and receive a dividend thereunder. With this request the trustees refused to comply, and this bill was in consequence filed praying to have the trust duly administered and the plaintiffs admitted to participate in its benefits, and the motion is now made for the purpose of having the trust funds, admitted by the answer of *Farish*, paid into court.

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It is undesirable that we should now pronounce any settled judgment upon that which forms the principal point in this case; but without meaning to conclude any thing, and subject to such change of opinion as further evidence and argument may produce, I am of opinion that the equity of the plaintiff is too doubtful to warrant us in making the order now asked.

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The object of all parties in entering into arrangements of this kind, is to prevent the estate from being squandered; in accomplishing that object in the way proposed in this case, the debtor stipulates for an absolute release from liability to those who participate in the proposed benefit; while the creditors, looking as well to the position of the debtor as to their own more peculiar interest, consent to release pre-existent rights, preferring the composition secured by such a deed, coupled with the immunity thereby purchased for the debtor, to the uncertain fruit of adverse litigation. Such an appropriation on the part of the debtor is purely voluntary; he may annex any condition not inconsistent with the rules of law; and the debtor in this case might have limited a time for the execution of the deed, or stipulated that in case all, or any particular number of his creditors, should fail to execute the deed, it should become void; but he thought proper to execute a deed without any such condition; relying, I presume, on the advantageous nature of the proposition for securing the concurrence of his creditors. It was open to the creditors, on the other hand, to have either accepted or rejected this proposal; they might either have come in under the deed or stood upon their original rights; but it is obvious that they could not be permitted to claim under both. The provision made by deeds like the present, as also the composition provided by what are, with more strict propriety, termed composition deeds, is substitutional, not cumulative; and creditors must elect whether they will stand upon their original rights, or accept the composition offered in lieu thereof.

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It is argued, however, that the complainants in this case do not desire to claim in both rights, but are willing to abide by the deed. But do they not in effect seek the

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
benefit to be derived from proceeding in both rights? Did they not elect to proceed upon the confession of judgment executed in favour of the *McKays*, and did they not pursue that litigation until a competent jurisdiction had pronounced a judgment in favour of those claiming under this deed, and adversely to those impeaching its validity, and claiming under the judgment? Have they not already had all the benefit the law would permit them from proceeding upon this judgment, and can they now be permitted to claim under the deed? The question is not whether the choice was or not prudent, but whether it was made. It is well settled that had these plaintiffs elected to take the benefit of the deed, this court would have enjoined them from proceeding upon the judgment, irrespective of the release, because such a proceeding would be contrary to the whole spirit of the arrangement. It is true that the proposition, upon which the defence to this suit is rested, is the converse of that I have just stated. The question submitted to us is, whether creditors, who have proceeded to enforce their original rights, in opposition to this composition deed, can afterwards be permitted to share in its benefits. But do not both questions depend upon the same principle? If this court would have enjoined these creditors from proceeding upon this judgment, in case they had elected to come in under this deed, because such proceedings would be contrary to the spirit of the arrangement into which they had entered, can it now admit to the benefit of the deed those who have already pressed their right under the judgment to the extremest point? It is true that this court always favours the rights of *bona fide* creditors, and had these complainants simply refrained from executing the deed, they might have been relieved; but to refuse, or neglect to execute the deed is one thing,—to set up an adverse claim, and seek to have the trust deed set aside as invalid, is quite another; we have been furnished with no authority to shew that we should be warranted in admitting the plaintiffs to participate in the benefits of this deed under such circumstances.—*Field v. Lord Donoughmore*, (a) would seem in

point. There, *Field*, one of the several creditors, had joined in a letter of license, but when the composition deed had been prepared, some difficulty arose as to the amount of his debt, and then, instead of executing the deed, he brought an action against the debtor for the recovery of his claim, which he proceeded with till by the death of *Keoghs* the suit abated. He then signed the deed, (by permission of Lord *Donoughmore* the trustee,) and filed his bill to be admitted to the benefit of the trust; but the Lord Chancellor of Ireland dismissed the bill. It may be remarked, that one question which arose in *Field v. Lord Donoughmore*, is not presented by the case before us. It was argued there that the amount of *Field's* debt being in dispute, an action was necessary to determine that point; and that the bringing of such action should not be construed into an election to claim against the deed. No such difficulty exists here. We are not left to imply an election from doubtful conduct, for the repudiation is distinctly sworn to, and the proceedings of the plaintiffs are utterly at variance with any notion of their claiming under the deed. Judgment.

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But it is argued that *Field v. Lord Donoughmore* should not govern, inasmuch as the proceedings there taken were proceedings taken against the debtor, and were persevered in till his death, when, of course his assent to the creditors signing the deed was impossible; whereas, in this instance, the debtor not only sanctioned the legal proceedings upon the judgment, but has always been willing that these plaintiffs should be admitted to the benefit of the trust. But before determining the circumstances to which I have alluded to be essential, we must consider the nature of deeds of this description, and the peculiar considerations which result from thence, some flowing from the nature of such contract, and others growing out of the complexity of interest to which they give rise. The utmost good faith, and a punctual observance of the spirit and letter of the contract, is exacted from all parties. Should the debtor fail to perform his part, by the improper concealment of any part of his estate, or by neglecting to pay the stipulated composition at the time agreed upon, the creditors are re-

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mitted to their original rights; and, on the other hand, all underhand agreements by which any creditor would acquire a peculiar advantage, are deemed fraudulent and void; not fraudulent as against the debtor, who generally acts with full knowledge of all the circumstances, but fraudulent as against the creditors, as an infringement of the spirit of the agreement under which all claim. And although the deed be, in its inception, a mere voluntary appropriation by the debtor, in which the creditors have no legal interest until it has been acted upon, yet, when acted upon, every creditor acquires an interest in its provisions and their faithful observance, which is certainly not second to that of the debtor. Now, if in this case the institution of proceedings against the debtor, by any of the creditors, would have been such a violation of the spirit of the contract, in regard to the interest of the debtor, as to have warranted this court in refusing to admit such creditor to the benefit of the trust, would it not seem to follow, *a fortiori*, that the present plaintiffs, who instituted proceedings for the purpose of impeaching the trust deed under which the defendants claim, and of thus rendering their security void, cannot now be permitted, upon the failure of such an attempt, to share in the benefits of that deed, against the will of such creditors? And would not the assent of the debtor, under the circumstances of this case, seem rather to weaken than add strength to the plaintiffs' case?

Very much of the language of Sir *Edward Sugden* in the case to which I have referred, would seem strictly applicable to the circumstances now under our consideration. He says: "But then the court, in letting in one class of creditors to the benefit under such a deed as this, is bound to see that he has performed all its fair conditions. This is a necessary preliminary to the rights of such a creditor to participate in the fund. The object of all such deeds is to prevent the estate from being torn to pieces; and this court when called on to effectuate them, is bound, in the first instance, to enquire *whether the arrangements to protect the estate, which were entered into between the debtor and his creditors, have or not been faithfully performed, and*

in every case where it finds any creditor to have deviated from or disturbed the arrangement, is bound to deprive him of all benefit under the deed." And again: "How is it possible that I can now let this plaintiff in to the benefit of this trust deed, who, so long as he thought it for his interest, declined to do any thing which would have prevented him from acting in opposition to the provisions contained in the deed." (a).

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Upon the whole, the plaintiffs' equity is so doubtful upon the facts at present disclosed, that I am of opinion that this motion must be refused, with costs. (b)

JAMESON, V. C., concurred.

ESTEN, V. C.—In this case, the defendant *McKay* having given a confession of judgment for securing the debts of the plaintiffs, who were the majority of his creditors in point of number, afterwards executed an assignment of all his personal effects to the defendant *Farish*, who was principal creditor in point of amount, for the purpose of securing all his debts indiscriminately and rateably. This deed was made before any execution had been issued upon the judgment entered up in pursuance of the confession. The plaintiffs, upon being applied to for that purpose, refused to become parties to this deed, and clung to their confession, upon which they entered up judgment; and having issued execution upon the judgment, attempted to enforce it against part of the goods comprised in the assignment: whereupon the sheriff obtained a summons to compel the parties to interplead; and in the course of the proceedings which ensued, the plaintiffs used every endeavour to shew that the deed was void, and to effect its overthrow. It seems, however, perfectly clear, that no objection could have been considered as attaching to it, which their acquiescence would not have removed; and therefore they must be considered as having deliberately made their election to abide by the security which they had, and to repudiate the assignment. Under these circumstances, it appears to

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(a) *Lane v. Husband*, 14 Sim. 656; *Johnson v. Kershaw*, 1 DeG. & S. 260.

(b) *St. Victor v. Devereux*, 13 Sim. 641; *Richardson v. Bank of England*, 4 M. & C. 165.

1850. me that it would be contrary to both principle and authority to permit them at this late hour to become parties to the deed. There is one circumstance, however, in the case, which creates some difficulty in my mind. The debtor *McKay* is willing that the plaintiffs should execute the deed, and their exclusion will deprive him of half the consideration or equivalent for which he stipulated, when he surrendered his property for the payment of his debts, and will leave him and any future property which he may acquire liable to the plaintiffs' demands, while it will give the defendants more than the rateable proportion for which alone they contracted, and perhaps satisfaction in full, which seems hard, if these last mentioned creditors, who have acceded to the assignment, can be indemnified against the effects of the plaintiffs' hostile proceedings. The case would have been stronger in favour of the debtor, if he had not himself concurred in all those proceedings. Although, however, I feel considerable difficulty on this point, yet as it does not rest on any authority that has come under my observation, it is not sufficient to prevent me from concurring, in the determination of this case, with the rest of the court. I think, therefore, that this motion must be refused, and with costs.

Judgment.

SODEN V. STEVENS.

Foreclosure—Notice.

Such circumstances as are sufficient notice to put a party upon enquiry, will not prevail over a registered title, although it might be sufficient in other cases.

Quære—Whether constructive notice of any kind is sufficient for this purpose.

This was a bill to foreclose a mortgage given by one of the defendants to the plaintiff. From the pleadings and evidence in the cause, it appeared that the land in question had been granted by the crown to *Alfred Stevens*, one of the defendants, who some years afterwards conveyed to his son *Robert Gourlay Stevens*, the other defendant; and the deed thus executed was duly registered. It further appeared that about two years subsequently the son re-conveyed the premises in question to his father, but this conveyance was not registered until some years afterwards. A few days after the execution of the deed from *Robert Gourlay Stevens*

to his father, the mortgage to the plaintiff was made by *R. G. Stevens*, and duly registered the same day. Both the father and son resided on the land for some years before and after the execution of the mortgage. It was in evidence, that the son was considered in the neighbourhood as owner of the property; and it did not appear that any change in the possession, or management of the land, took place after the execution of the deed from the son to his father.

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v.
Stevens.

The defence set up was, that *Robert Gourlay Stevens*, at the time of giving the mortgage, had not any title; and that although the mortgage was registered before the deed from him to *Alfred Stevens*, still the plaintiff must be taken to have had notice of the state of the title, from the fact of *Alfred Stevens* residing on the lot.

Mr. *Vankoughnet*, for the plaintiff, contended, that notwithstanding the conveyance by *Robert Gourlay Stevens* to his father, still the mortgage must prevail against it, even if made for valuable consideration, of which there was not any evidence, the mortgage having been first registered, and no notice having been given to the plaintiff of the change of title—the title to *Robert Gourlay Stevens* was duly registered, and no change of possession had ever taken place—and cited 3 Sug. V. & P. 469, and cases there mentioned as to notice. He also referred to *Stephens v. Stephens*, (a) *Jones v. Smith*. (b)

Argument.

Mr. *Read* and Mr. *R. Cooper*, for the defendants, relied upon the deed re-conveying the property to *Alfred Stevens* as being a *bona fide* transaction; and that the plaintiff had notice of it from the fact of the grantee being in possession—and cited, amongst other cases, *Cooke v. Clayworth*; (c) *Eyre v. Dolphin*; (d) *Allen v. Anthony*, (e) and *Story* Eq. Jur. s. 805.

ESTEN, V. C.*—In this case the lands in question were granted by patent in 1836, to the defendant *Alfred Stevens*, and by him conveyed in March, 1840, to the defendant

(a) 2 C. C. C. 20. (b) 1 Ph. 244. (c) 18 Ves. 12. (d) 2 B. & B. 301. (e) 1 Mer. 232.

*The Chancellor's judgment was not written; and as the Reporter did not make any note of it when the case was disposed of, he is unable now to supply it. It was, however, to the same effect as that of Esten, V. C.

1850. *Robert Gourlay Stevens*. This conveyance was registered, and subsequently to its registration, and on the 21st March, 1842, the lands in question were re-conveyed by the defendant *R. G. Stevens*, to the defendant *Alfred Stevens*. Seven days afterwards, and on the 28th of March, 1842, the mortgage, for the foreclosure of which this suit has been instituted, was made by the defendant *R. G. Stevens* to the plaintiff. Both the mortgage and the deed to *Alfred Stevens* purport to be for valuable consideration. The mortgage was registered on the same day that it was executed. The deed to *Alfred Stevens* was not registered until the year 1846. *Alfred Stevens* is the father of *R. G. Stevens*. The possession appears to have been joint in the father and son, for sometime before and after the mortgage. In fact, the whole family appear to have resided on the property, but *R. G. Stevens* is stated to have been considered the owner of it in the neighbourhood. The answers, as read, admit the patent, and the execution and registration of the deed from *A. Stevens* to *R. G. Stevens*, before the execution of the deed from *R. G. Stevens* to *A. Stevens*. The defendants prove the deed from *R. G. Stevens* to *A. Stevens*, and the plaintiff proves his mortgage and its registration. This deed purports, and must, I think, *prima facie* be presumed, to be for valuable consideration, which the bill alleges to consist of two notes and an account. The consideration is impeached by the answers, but the evidence fails to touch it. The mortgage, therefore, has priority both at law and in equity *prima facie*; and the question is, whether the defendant *A. Stevens* has any claim, and whether the plaintiff had notice of it at the time of the execution of the mortgage. It is certain that notice, which is sufficient in other cases, will not prevail over a registered title (a).

Judgment.

It may be doubted whether constructive notice of any kind is sufficient for this purpose. Without undertaking to decide this point, I am of opinion that the possession of *A. Stevens* in this case, is not so clear and decided as to countervail the title of the plaintiff arising from prior registration, supposing the plaintiff to have had actual knowledge of

such possession, or that such knowledge must be presumed. If it had appeared that the plaintiff had notice of the title of *A. Stevens*, it would have been necessary to decide whether such title could be considered as having any existence as against the plaintiff. The bill impeaches the conveyance by *R. G. Stevens* to *A. Stevens*, for actual fraud, and also insists that it is void as against the plaintiff for want of consideration. Doubtless *R. G. Stevens* was guilty of a fraud, but the evidence fails, I think, to bring home any actual fraud to *A. Stevens*. If, however, the conveyance to *A. Stevens* was voluntary, it would be fraudulent and void as against the plaintiff, who must be deemed a purchaser for valuable consideration, although he had notice of it. As it purports to be for valuable consideration, it must be presumed to be so, until the consideration of it is impeached. For this purpose the subscribing witness was asked whether any consideration passed at the execution, and he answered in the negative. Other witnesses depose that *A. Stevens* was not in circumstances to pay the consideration; and, under all the circumstances of the case, I am inclined to think that the consideration of this deed is sufficiently impeached to impose upon the defendants the onus of establishing its reality; and the evidence having failed to accomplish this end, that on this ground also the plaintiff must have succeeded. Upon the whole I think the plaintiff is entitled to a decree in the usual form

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Soden
v.
Stevens.

Judgment.

SAUNDERSON V. CASTON.

Pleading—Mortgagor—Dower—Infant.

When the wife of a mortgagor has joined in the mortgage to bar her dower in favour of the mortgagee, it is not improper to make her a party to a suit to foreclose the mortgage, although the conveyance contains no express limitation of the equity of redemption to her.

Form of decree upon a bill by a mortgagee against the infant heir of the mortgagor.

The bill in this case had been filed against the widow and the two infant daughters and co-heiresses of the mortgagor. The points mainly discussed in the case were the propriety of making the widow, who was also the adminis-

1850. ^{Saunderson} ^{v.} ^{Caston.} tratrix of the mortgagor, a party to the suit; and the power of the court to direct an *immediate* sale of the premises, in the event of a sale being decreed.

Mr. Mowat, for the plaintiff, cited *Christophers v. Sparke*, (a) *Daniel v. Skipwith*, (b) *Dolin v. Coltman*, (c) *Jackson v. Innes*, (d) *Dixson v. Savville*, (e) *Perry v. Barker*, (f) *Seaton on Decrees*, 274.

Mr. Vankoughnet for defendant.

Powell on Mortgages, 1016, *Reeve v. Hicks*, (g) and *Jackson v. Parker*, (h) were also referred to.

The facts of the case and the arguments of counsel are sufficiently stated in the judgment of the court, which was delivered by

Judgment. THE CHANCELLOR.—In this case a mortgage in fee was made to the plaintiff for securing the sum of £250 on the 1st of April, 1850, and interest in the meantime. The interest was paid to May, 1838, but default was made in the payment of the subsequent interest and of the principal. The mortgagor having died intestate, this bill is filed against his two infant co-heiresses and his widow, who had joined in the mortgage for the purpose of barring her dower, and her second husband, praying a sale or foreclosure in the alternative. The widow obtained letters of administration soon after the death of the intestate; and she is, or may be, made a party to the suit in her double capacity of doweress and administratrix. We have not been referred to any case where upon a mortgage, in which the wife had joined for the purpose of barring her dower, and no express limitation of the equity of redemption had been made to her, she either filed a bill to redeem or was made a party to a suit for foreclosure; and my learned brothers inform me that their recollection of the practice in England, upon the investigation of titles, and of the general understanding of the profession upon the subject, is adverse to such a claim. Upon searching for authority upon the point, it appears that little or none exists. Such as it is, however, is in favour of the widow's right; and as the general opinion here is likewise

(a) 2 J. & W. 229. (b) 2 B. C. C., 155. (c) 1 Vern. 294. (d) 1 Bligh. 126. (e) 1 B. C. C. 326. (f) 13 Ves. 205. (g) 2 S. & S. 403. (h) Ambler, 687.

in favour of the widow's claim, and it is one which reason sanctions and recommends, it ought perhaps, until some authoritative decision takes place on the subject, to be allowed. The question which was raised between the parties in the present case was, whether, if a sale should be decreed, it should be an immediate sale, or whether the usual time should be allowed for redemption as upon a foreclosure. I may remark that the plaintiff has himself decided this question, for he asks for a sale expressly in case default should be made in the payment of the mortgage money at the time appointed. Unless therefore he amends the prayer of his bill in this respect, it does not appear that we can resist the defendant's claim to the usual allowance of time. No difficulty, we think, exists in defining the abstract rights of the parties in such a case. Upon the death of the mortgagor, any creditor, whose debt may become a charge upon the real estate, (and this includes all creditors in this country,) may file a bill for the payment of his debt, first out of the personal estate, and, if that be insufficient, then out of the lands. A mortgagee cannot stand in a worse situation in this respect than any other creditor; and it is natural and proper, that if the personal estate should prove deficient, he should ask for a sale, not of the lands generally, but of the particular lands which have been pledged to him for the security of his debt. In the case of *Daniel v. Skipwith*, (a) it is laid down, that after the death of the mortgagor, where the heir and personal representative are one and the same person, the mortgagee may have the sale of the lands in the first instance; but where they are different persons, an account and application of the personal estate must take place before a sale of the lands can be had. What therefore the plaintiff may demand, if he choose, is, that an account may be taken of the personal estate, and if that should not be sufficient for the satisfaction of his debt, that the lands may be sold for that purpose. This will involve an administration of the estate. On the other hand, it is the practice of the court, as appears from the case of

1850.

Saunderson
v
Caston.

Judgment.

(a) B. C. C. 155.

1850. *Mondey v. Mondey*, (a) when a bill of foreclosure is filed by the mortgagee after the death of the mortgagor, and the heir is an infant, to refer it to the master, with the consent of the mortgagee, to enquire whether a sale or foreclosure will be most for the benefit of the infant. Under such circumstances, it appears that the usual decree for redemption or foreclosure is pronounced in the first instance; and the reference, I have mentioned, is added, and further directions and costs are reserved. The common decree is made in the first instance, probably, to prevent loss of time, which would otherwise result, in case the master should report in favour of a foreclosure. The conclusion is, that the plaintiff may either have an account of the personal estate, and a sale, in case it should prove deficient; or the usual reference may be made, with his consent, to the master for the benefit of the infant. If the former case, he will be detained by the necessity of applying the personal estate in the first instance; in the latter, the master may possibly report in favour of a foreclosure.

Judgment.

REES V. JACQUES.

Practice—Dismissing bill.

Where one of the defendants in a suit had answered, and the time for replying had expired, a motion was then made to dismiss the bill as against him for want of prosecution, but it appearing that such defendant was president of an incorporated company, whose answer had not yet been filed—the motion was refused with costs.

Mr. *R. Cooper* for the defendant *Beckett*.

Mr. *Mowat* contra.

The facts are sufficiently stated in the judgment of

THE CHANCELLOR.—In this case the suit is obstructed by the want of the answers of the defendants *Dick* and the *Dry Dock Company*. It does not appear that due diligence has been used to get in the answer of the defendant *Dick*. The defendant *Beckett*, in his private capacity, would be entitled to move to dismiss the bill for want of prosecution, and the plaintiff would be obliged to undertake to speed the cause. *Beckett* must however be intended to be the president of the company; he admits that he was president

of the company on the 17th March, 1849; the election by the act, which is a public one, takes place on the first Monday in May; in July, 1849, he signs the answer of the company as president; in January, 1850, he receives notice that a sequestration will be issued against him as president of the company; and no affidavit has been filed by him upon the present occasion. It is the duty of the president and directors to put in the answer of the company, which they have not done, and therefore *prima facie* they are, one and all, hindering the cause. This delay may be susceptible of explanation, but none has been given. No party, who is himself obstructing the cause, should be allowed to move to dismiss the bill for want of prosecution, although other obstacles exist which the plaintiff has not used due diligence to remove. The defendant *Beckett* is, in conjunction with other persons, obstructing the suit, and therefore cannot move to dismiss the bill for want of prosecution. The motion must be refused, with costs. *Partington v. Baillie*, (a) is an authority on this point.

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Saunderson
v.
Caston.

Judgment.

JONES V. BAILEY.

Practice—Payment of mortgage money.

An order granted, changing place for paying mortgage money.

Mr. *Mowat* moved for an order, changing the place appointed for payment of the mortgage money due, and for which the usual decree for foreclosure had been obtained. The money, by the master's report, had been ordered to be paid at the office of *Eccles & Cole*, who had since dissolved partnership. *Cole* now made affidavit of these facts, and that he (*Cole*) was solicitor and had his office in Toronto, where that of *Eccles & Cole* had been also. The order desired was that the money might be directed to be paid at the office of *Cole*, instead of at that of *Eccles & Cole*, and that personal service might be dispensed with.

The proceedings taken against the defendant had been taken under the mortgage orders of January, 1845.

THE CHANCELLOR.—We have considered this application, and cannot with propriety grant the order as asked.

(a) 5 Sim. 667.

1850. The orders of court referred to limit the indulgence to be allowed; nothing is said in them warranting *ex parte* proceedings after decree. We grant the order, changing the place for payment of the money, but cannot possibly dispense with personal service of it on the defendant, who has not appeared by solicitor.

Jones
v.
Bailey.

DAVIS V. CASPAR.

Practice—Attachment.

A party arrested upon an attachment issued out of this court, is entitled to the benefit of the gaol limits on production to the sheriff of the certificate, from the clerk of the crown, of bail having been filed according to the provisions of the statute 10 & 11 Vic., ch. 15, which places prisoners in custody upon such attachment on the same footing as debtors.

And where in such a case the sheriff took bail to the limits and discharged the prisoner, an order on the sheriff, directing him to pay the amount for which the party had been arrested, was refused, the court considering it doubtful whether the act 10 & 11 Vic., ch. 15, would have the effect of repealing the provisions of 11 Geo. IV., ch. 3, but left the party to his action at law.

The facts of this case and the grounds of the motion are sufficiently set forth in the judgment of the court.

Mr. *Eccles* for the defendant.

Mr. *Vankoughnet* for the sheriff.

Judgment.

THE CHANCELLOR.—I do not think that we can properly make any order upon this motion. With regard to the first attachment, in respect to which it is alleged that the sheriff suffered the prisoner to go at large, upon the certificate of the clerk of the crown that the proper recognizance had been filed, I am of opinion that the sheriff has complied with the statute. The recognizance is directed to be filed with the “clerk, or deputy clerk of the crown, or the clerk of the district court, as the case may be,” and the prisoner is entitled to his discharge upon the proper certificate from that officer. Whether that provision was introduced intentionally, or by mistake, it is not for us to enquire. The directions of the act are explicit, and, in my opinion, the sheriff has complied with them.

As to the second attachment, where no recognizance has been filed, the 10 & 11 Vic., ch. 15, places prisoners in custody upon an attachment out of this court upon the same footing as debtors. It may, perhaps, be reasonably doubted

whether the provisions of that act were intended to be cumulative or substitutional. The proviso to the first clause would seem to indicate that the legislature intended them to be substitutional; but then the 3rd ch. of the 11 Geo. IV. has not been expressly repealed, and it may be doubted whether we would be warranted, consistently with well established rules of construction, in holding the provisions of the latter statute, so far as they are favourable to prisoners, to have been impliedly repealed.

But although no doubt existed as to the proper construction of the statute, I would be of opinion that the order asked for by this motion should not be made except under special circumstances. Control is obviously necessary in cases of this description to check abuse, else the process of the court would become nugatory; but to proceed in this summary way, in the absence of special circumstances, would seem to me harsh and unjustifiable. In the case in *Vesey*, (a) Lord *Eldon* characterised the order as a strong measure, although the sheriff neglected to appear; and when that decision was cited to the Vice-Chancellor of England, (b) he, upon consideration, came to the conclusion that there existed no settled practice sufficient to bind him; and regarding the order as severe and harsh, he refused the motion. In this case, I am of opinion that no special circumstances have been shewn requiring the summary intervention of the court, and that this motion should therefore be refused, but, under the circumstances, without costs.

JAMESON, V. C., concurred.

ESTEN, V. C.—In this case, an injunction having been dissolved and the bill afterwards dismissed with costs, two attachments were issued for their non-payment, and the plaintiff was arrested upon both. From the first he was discharged by the sheriff upon an exhibition of the certificate of the clerk of the crown under the statute; upon the second, the sheriff accepted bail and discharged the prisoner into the limits. An application is now made by the defendant in the suit, to whom the costs were payable, that the

1850.

Davis
v.
Caspar.

Judgment.

(a) Anon. 11 Ves. 170.

(b) Collard v. Hare, 5 Sim. 10.

1850. sheriff may pay the amount, on the ground that he exceeded his duty in the proceedings above mentioned. My opinion is, that with regard to the first attachment, the sheriff has pursued the right course, and that no ground whatever exists for the application. With regard to the second attachment, I think the sheriff was mistaken. It appears to me that the only limits now existing, are the extended limits provided by the act, and that a prisoner cannot be discharged into these limits without entering into the recognizance which the act prescribes. It does not follow, however, that this motion must be granted. The jurisdiction to which it appeals, confessedly harsh and severe, appears also to be doubtful.—*Collett v. Hare.* (a) It is true that the circumstances which occurred in that case do not exist here—namely, the return day of the attachment not having arrived and the sheriff having re-taken the body; but if I understand the Vice-Chancellor's judgment rightly, he considered the jurisdiction doubtful, independently of those circumstances; and therefore I do not think it would become us to exercise a severe and doubtful jurisdiction in a cause where the party, if his interpretation of the act is correct, has a sufficient remedy at law. The motion must therefore be refused, but, as I think the sheriff was partially wrong, and as considerable authority existed to warrant the application, without costs.

Davis
v.
Caspar.

Judgment.

CROOKS V. SMITH.

Pleading—Demurrer—Multifariousness.

Three persons carried on business in co-partnership for a short period, when one of them retired; the other two continued to carry on the business for some time afterwards, when a dissolution took place, but no settlement of the accounts of either of the co-partnerships was had: one of the parties filed a bill against the other two for an account of the partnership dealings of both firms; to this bill a demurrer, by the partner who had retired, on the ground of multifariousness, was allowed with costs.

The bill in this cause was filed by *Robert P. Crooks* against *John Shuter Smith* and *Larratt W. Smith*, for an account of the partnership dealings of the two firms of *Smith, Crooks & Smith*, and *Crooks & Smith*. From the statements in the bill, it appeared that, in February, 1845, Mr. *Crooks*

and the Messrs. *Smith* entered into co-partnership as solicitors and attorneys for a period of ten years, under the firm of "*Smith, Crooks & Smith*;" that about seventeen months thereafter, Mr. *John Shuter Smith* availed himself of a stipulation in the articles of co-partnership, by which either of the partners was enabled to retire from the co-partnership upon giving to the others six months' notice of such his intention; that a short time after this notice was given, *J. S. Smith* was, by agreement between the parties, allowed to retire without waiting for the expiry of the notice; and that Mr. *Crooks* and Mr. *Larratt W. Smith* continued to carry on the business under the firm of "*Crooks & Smith*." It further appeared that the latter firm had been dissolved, but no settlement of accounts had taken place, and that Mr. *Crooks* claimed a sum as due to him from the firm of *Smith, Crooks & Smith* of £425, or thereabouts, and that that sum was standing at the credit of *Smith, Crooks & Smith* in the books of *Crooks & Smith*, and Mr. *Crooks* sought to have that sum applied to the payment of his demand. The bill prayed an account of the dealings of the several firms of *Smith, Crooks & Smith*, and *Crooks & Smith*.

1850.

Crooks
v.
Smith.

Statement.

To this bill the defendant *John Shuter Smith* filed a demurrer on the ground of multifariousness, and the demurrer coming on for argument,

Mr. *Vankoughnet*, after having opened the pleadings, was about to proceed to argue in support of the demurrer, when the court expressed a desire to hear the other side.

Mr. *Crooks* and Mr. *Turner* for the plaintiff. In this case it is no new partnership that was formed between the plaintiff and *Larratt W. Smith*, but the three parties, *John Shuter Smith*, the plaintiff, and *Larratt W. Smith*, being in partnership and carrying on business, *John Shuter Smith* merely retires, and in carrying on the business of *Crooks & Smith*, the accounts of *Smith, Crooks & Smith* were carried into the accounts of the firm of *Crooks & Smith*; and if in such case *John Shuter Smith* had not been made a party, the bill, it is submitted, would have been imperfect. (a) The bill as against *L. W. Smith* is clearly not multifarious; and we

(a) Campbell v. McKay, 1 M. & C. 603.

1850. contend that, although relief as against *J. S. Smith* cannot be carried to as great an extent as against *L. W. Smith*, still one of the parties being interested in the entire object of the suit, *J. S. Smith* cannot be heard to object on the ground of multifariousness. (a) This is an objection which the courts never favour; and in the present instance *J. S. Smith*, if it were clear that he was not a necessary party, cannot possibly be damnified, by being made a party to the bill, as the master may make a separate report of each partnership. (b)

Argument.

Mr. *Vankoughnet* in reply.—The mistake is, that the plaintiff seems to take an incorrect view of what is termed, the entire object of this suit, for clearly *J. Shuter Smith* is not at all interested in one portion of the relief sought by this bill. If, for instance, three persons contracted to build a ship, and after the contract had been partly performed, one of the three retires from it, and it is afterwards completed by the other two; in such case if any dispute should arise between the parties, all three would be necessary parties to a bill to settle their respective rights, each being interested in the entire contract. But had the contract been to build two or more vessels, and one of them should be actually finished by the three jointly, and then one should retire, and the other two should then proceed and build the remaining vessel or vessels; in that event it is clear that the partner who had retired could not possibly be a necessary party to a bill for an account of the profits arising from the building of such of them as were built by the two partners only; he would be interested only in the accounts respecting the first built vessel. And in this case, if the firm of *Crooks & Smith* had continued to carry on business for the remainder of the term, (upwards of eight years,) *J. Shuter Smith* would, if the view taken by the other side be correct, be a necessary party to a suit which might last for many years, in taking the accounts of the dealings of a partnership with which he had not any concern, simply because he had ten

(a) *Attorney-General v. Craddock*, 3 M. & C. 94; *Story's Equity Pleadings*, ss. 271 & 272; *Attorney-General v. Corporation of Poole*, 4 M. & C. 17; *Knye v. Moore*, 1 S. & S. 65.

(b) *Parr v. Attorney-Gen.* 8 Cl. & F. 483; *Salvage v. Hyde*, 5 Madd. 94.

years before been interested in a partnership in which also Messrs. *Crooks & Smith* had an interest. (a) 1850.

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Smith.

THE CHANCELLOR.—I am clearly of opinion that this demurrer must be allowed. The bill states that in the month of February, 1845, the plaintiff and defendants entered into co-partnership as attorneys and solicitors for a period of ten years, under the style of "*Smith, Crooks and Smith.*" The articles, as stated in the bill, contain a provision that if any partner should become desirous of withdrawing within the ten years, it should be permitted him so to do, upon giving six months' notice; but, in that event, the retiring partner is prohibited from practising in the city of Toronto within the period of ten years. The partners are prohibited from determining the partnership except as therein provided, and in the event of the retirement of any partner under those stipulations, it is declared that such retirement should not operate as a dissolution, but that the firm should subsist, upon the like terms, between the continuing partners. It is further stated, that upon the 15th July, 1846, *Mr. J. S. Smith* served a notice upon his co-partners to the effect that it was his intention to withdraw from the firm in six months. This notice, however, was not acted upon, for upon the 29th of the same month the co-partners mutually agreed to dissolve the partnership upon the 13th of the succeeding month; and upon the same day articles to that effect were executed by all parties. This instrument is set out in the bill; it is headed, "Agreement for a dissolution of the co-partnership of *Smith, Crooks and Smith.*" Under this agreement, *Mr. J. S. Smith* conveys to *Mr. L. W. Smith* land of the value of £500, and is released by his co-partners from the agreement not to practise in the city of Toronto. It is provided that all the books are to be made up to the time of dissolution, the debts paid and the assets equally divided. The bill then avers that the business was conducted under the articles up to the 13th day of August, when it was dissolved by mutual consent, so far as regarded *J. S. Smith*; and that the usual notice of such dissolution was published. It is then stated that Messrs. *Crooks and L.*

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 Smith.

W. Smith carried on their business as attorneys from the date of the aforesaid dissolution, upon the terms of the articles of February, 1845, under the style of *Crooks & Smith*; but that, as to their business of solicitors, they entered into a new co-partnership with Mr. *Morphy* from the date of the dissolution; and that that branch of the business was carried on under the style of "*Crooks, Smith & Morphy*." Both firms continued up to the 26th of January, 1849, when they were dissolved by mutual consent. The bill alleges that the accounts of *Smith, Crooks & Smith*, and also the accounts of *Crooks & Smith*, remained unsettled, and asks an account.

Judgment.

Now, it cannot be doubted, I think, that a bill such as I have described this to be (without reference to the specialty upon which reliance has been placed, and to which I shall advert presently,) would be multifarious. The court, says Lord *Redesdale*, (a) "will not permit a plaintiff to demand by one bill several matters of different natures against several defendants." Mr. *Story* (b) says, "by multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill," a definition which embraces what has been termed misjoinder, as well as the defect which is, with more strict propriety, designated multifariousness. Lord *Eldon* says, (c) "seeking to enforce different demands against persons liable respectively but not as connected with each other, is clearly multifarious." It is perfectly obvious that where the defect in the bill is the misjoinder of distinct subjects of different natures against the same defendant, then the application is one altogether to the discretion of the court. Can such distinct and separate matters be conveniently united in a single suit?

And it is equally obvious that where, from the partial

(a) Mitford's Pleadings, p. 181, 4th ed. (b) Story's Equity Pleadings, s. 281.

(c) *Santon v. Davis*, 18 Ves. 72.

connexion of different defendants, or the amalgamation of the different grounds of property which forms the subject of litigation—where, from either of these causes, or both, it becomes impossible to affirm that the plaintiff is seeking to enforce distinct matters against defendants liable respectively, though not as connected, in that case also, although the bill, if defective, would be multifarious in the strict sense of the term, yet the question is one of degree, depending upon the discretion of the court, rather than upon any fixed rule.

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Admitting, then, the impossibility of defining as an abstract proposition what it is that constitutes multifariousness, and admitting the difficulty inherent in questions of this character,—because from the curious interlacement of human events, combinations must frequently occur, of which it will be difficult to say whether, in the language of Mr. *Story*, “the matters are distinct and independent,” and whether, according to the definition of Lord *Eldon*, “the parties are liable respectively and not as connected with each other; and admitting that the question in such cases depends rather upon the discretion of the judge than upon the strict applicability of abstract principles, still I cannot persuade myself that the case now under our consideration is of such a character as to render the application of that which is confessedly the general rule, at all difficult. Assuredly it cannot be doubted that the business and transactions of the firm of *Smith, Crooks & Smith* were capable of being completely severed from the business and transactions of *Crooks & Smith*. Neither can it be doubted, I think, that this was actually done by the articles of dissolution. By those articles, a distinct line of demarcation was drawn upon the 13th of August, 1846. Messrs. *Smith, Crooks & Smith* were completely disconnected from all transactions after that date, as were Messrs. *Crooks & Smith* from all transactions prior to it. Upon what principle, then, can the plaintiff ask to have the accounts of those two distinct firms taken in one suit? What has Mr. *J. S. Smith* to do with the accounts and difficulties of the firm of *Crooks & Smith*? Their dealings and transactions may be infin-

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for *misjoinder*. The demurrer of Lord *Beverley* objected to the bill as *multifarious*, in the strict sense; the grounds of demurrer were, that the bill united distinct and independent matters, with a portion of which Lord *Beverley* had no connexion. Both demurrers were allowed. Now if the account sought there was properly regarded as an account of separate and distinct transactions as to the defendant Lord *Beverley*, I think the argument is *a fortiori* against this bill.

But the case of *Campbell v. McKay* (b) was relied upon as in point. That was treated during the argument as a case in which a bill praying an account of three separate trusts, against three sets of trustees, had been determined not to be multifarious. Undoubtedly if such be the true effect of that case, it is an authority in favour of this bill. But certainly such has not been supposed to be the effect of it, either by text writers, or by Lord *Cottenham* himself. Mr. *Story*, in speaking of the case, says, (c) “Although at first view it might seem open to the objection of multifariousness, yet, inasmuch as all the plaintiffs have a common

(a) 2 Ans. 469. (b) 1 M. & C. 603. (c) *Story Equity Pleadings*, s. 278.

interest in the execution of all the trusts, *and there cannot be a due execution of some of the trusts without involving the consideration of all the parts arising under the deed and the will*, the court would not suffer the objection to prevail."

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But the whole argument of Lord *Cottenham* shews how much the joint duty imposed upon the trustees in that case, and the consolidation of the different funds, were regarded as excepting *Campbell v. McKay* out of the general rule. In repudiating the authority of the cases cited, the learned judge takes occasion to state the sort of case which he would regard as governing the one then under consideration, thereby obviously pointing out what seemed to him to be its peculiar features. He says, "What would be required to support the defendant's proposition would be, some case in which, there being a common interest in the plaintiff, *and the defendants representing and being interested in all the different questions raised on the record, and the suit having a common object*, a demurrer for multifariousness had been successful:" and again—"The result of the principles to be extracted from those two cases, negatives the proposition that where there is a *common liability and a common interest, the common liability in the defendants, and a common interest in the plaintiff, different grounds of property cannot be united in one and the same record.*"

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The bill in *Campbell v. McKay*, from the great specialty of the circumstances of that case, would not seem open to the charge of multifariousness under the definition of either Lord *Redesdale* or Lord *Eldon*. It was neither a "demand of several matters of a distinct and independent nature against several defendants," nor did it "seek to enforce different demands against persons liable respectively and not as connected with each other." Matters and persons were so connected together as to render the taking of the account in one suit, not matter of choice, but of necessity; and so Lord *Cottenham* himself seems to have viewed it. In the *Attorney General v. Cradock*, (a) he says—"There some of the parties were trustees of part only of the trust property in question; *but the trusts were so united by the allegations of the bill, that the whole was made one fund;*

(a) 3 M. & C. 95.

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and first the Vice-Chancellor, and afterwards myself, were of opinion that in such a state of circumstances, the objection of multifariousness could not be sustained. If that be so, according to the decision of *Campbell v. McKay*, when the defendant is a trustee of only a part, *but which part is so blended with the remainder as to make it improper to separate it," &c.*

I have thought it right to consider the case of *Campbell v. McKay* at large, both because it was much relied upon in argument, and because the subject now before us, was there elaborately discussed by the Lord Chancellor. I have not been able to extract from that decision any principle at all sufficient to sustain this bill; but although it could be shewn to depart from the general principle more widely than it has seemed to me to do, it could not, I think, govern the case now before us, which seems to me demurrable both upon principle and authority. *Benson v. Hadfield* (b) seems to me exactly in point, though a much stronger case in favour of the bill than the present; and yet the demurrer was allowed.

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But admitting the general rule, it is argued that in this case the different accounts have been so connected by allegations in the bill, as to render it proper that they should be taken in one suit; and in support of this argument, the learned counsel for the plaintiff relied upon a statement that a sum of £425, part of the assets of *Smith, Crooks & Smith*, had been received by *Crooks & Smith*, and credited to the former firm in the books of the latter. I can discover nothing in the statement to warrant us in disregarding the established rules of pleading by allowing the distinct accounts of distinct firms to be taken in one suit, when such a course has been objected to in the proper way. I am of opinion that the demurrer must be allowed.

JAMESON, V. C., concurred.

ESTEN, V. C.—In the year 1845, a partnership was formed between the plaintiff and the defendants under the style or firm of "*Smith, Crooks & Smith*," by articles of co-partnership; which provided, among other things, that any member of the firm should be at liberty to retire from it on giving six

months' notice of his intention so to do. The defendant, Mr. *J. Shuter Smith*, availed himself of this right, and gave the notice required by the articles. Thereupon a special agreement was made between the partners, to the effect that his retirement should take place on the 29th of July, 1846, instead of at the expiration of the notice, and otherwise altering the provisions of the articles in this respect. The plaintiff and Mr. *Larratt Smith* continued their business according to the articles, under the style or firm of "*Crooks & Smith*," until the 29th of January, 1849, when a dissolution of their partnership took place. No account of the affairs of *Smith, Crooks & Smith*, or of *Crooks & Smith*, was had upon the retirement of Mr. *Shuter Smith*, or upon the dissolution of the firm of *Crooks & Smith*; and the present suit is instituted by Mr. *Crooks* against Mr. *Shuter Smith* and Mr. *Larratt Smith*, for an account of the affairs of *Smith, Crooks & Smith* and of *Crooks & Smith*. To this bill a demurrer has been put in by Mr. *Shuter Smith* for multifariousness, and the question is, whether the bill is properly liable to objection on that ground. The rules with respect to multifariousness and misjoinder, which are frequently confounded, appear to be few and simple. Misjoinder arises where several causes of suit, in which the same parties are interested, are improperly combined in one suit; multifariousness, where a defendant is interested only in a part of the subject-matter of the suit; which part can be properly detached and separated from the rest. From this description, it is obvious that the present case, if it belongs to either of these classes, is a case of multifariousness, inasmuch as Mr. *Shuter Smith* contends that here are two partnerships, of the affairs of both which an account is sought by this bill, and that he is interested only in one of them. In this view I concur. I think that these are substantially two partnerships, although constituted under the same articles; and they are certainly not the less separate by reason of Mr. *Shuter Smith* having retired, not under the articles, but under a special agreement entered into for that purpose. *Prima facie* therefore, the accounts of the affairs of these firms should be taken in different suits, unless some

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special circumstance has occurred to render that course improper. The first circumstance relied upon for this purpose is, that a sum of £425 2s. 6d., or more, is due to the plaintiff from the firm of *Smith, Crooks & Smith*; and that a sum of £425 2s. 6d. stands in the books of *Crooks & Smith* at the credit of *Smith, Crooks & Smith*; and the plaintiff claims that this credit should be specifically applied to the satisfaction of his demand. This is relief which no partner has a right to demand; but if the plaintiff had such a right, it would create no necessity for amalgamating these two accounts, inasmuch as the process would consist simply in the transfer of a debt, which, in equity at least, can be effected without the consent of the debtor. The other circumstance relied upon to justify the form of this bill, was that the firm of *Crooks & Smith* had collected moneys belonging to *Smith, Crooks & Smith* to the amount of £425 6s. 9d., and were indebted to the latter firm in that sum; but it is obvious, that the fact of one firm being indebted to the other cannot render it necessary to complicate the accounts of the two firms. The circumstance which has created the greatest difficulty in my mind, both during and since the argument, was one which was not urged at the bar; namely, the necessity which exists for going into the accounts of *Smith, Crooks & Smith*, in order to take the accounts of *Smith* and *Crooks*. If the account of the affairs of the latter firm were confined to the transactions of that firm, it would not shew the true state of the account between the members composing it, which would depend not only upon these transactions, but upon how they stood towards each other in the former firm at the date of its dissolution,—since they continued the business of that firm on the basis of the accounts as they then stood. It struck me, that if it were necessary on this account to take the accounts of *Smith, Crooks & Smith* twice, it might be proper to combine the two firms in one suit; but, upon reflection, I had arrived at a different conclusion, inasmuch as this inconvenience is incidental to the situation in which *Smith & Crooks* stand, and has arisen from the manner in which they have chosen to prosecute their business; and it would be very hard, for

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that reason, to involve Mr. *Shuter Smith* in an account of 1850.
 transactions with which he had no manner of concern. Suppose, for instance, the partnership of *Smith, Crooks & Smith* had continued only for one year, and that of *Crooks* and *Smith* continued twenty-nine years; that the conduct of the business had been committed to one of the partners, and that the other had, or fancied he had, cause of complaint against his co-partner, on a multitude of transactions which it would require several hundred folios to put in issue; it would be very hard upon Mr. *Shuter Smith* to be obliged to take an office copy of a bill containing a history of a number of transactions with which he had no earthly concern. This view is fortified by the case of *Benson v. Hadfield*. (a) In that case, a firm acted for several years as agents for a company: during that time, a partner retired: a bill was filed by the company for a general account, and the partner who had retired demurred for multifariousness. The demurrer was allowed, because the intentment upon the bill was, that the transactions in which he had been concerned, were all closed before his retirement, and that a new set of dealings was commenced afterwards. This case seems to shew that where a partner has retired, he may nevertheless be properly a party to the general account, whose transactions have been continued from one firm to another in such a manner as to make one account necessary. I do not conceive this to be the case here, for although probably many suits commenced by the first were continued by the second partnership, I do not suppose that any difficulty would arise in separating the accounts of those suits, even in a suit by a principal against the two firms as his agents, much more in suits amongst the respective partners. In the case, however, of *Benson v. Hadfield*, the same necessity existed for taking double accounts, if the demurrer were allowed, as exists here; but that circumstance was not deemed sufficient to render one suit proper. Mr. *Wood*, the defendant, who demurred, had retired, and the other partners continued the business. If any bal-

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JONES V. CLARKE.

Practice—Surety—Re-sale.

Where an estate was sold under the decree of this court, and in the conditions of sale it was stated, erroneously, that the property was subject to dower, when, in reality, the dower attached to the equity of redemption only; in consequence of which the property brought a much less sum than it otherwise would—a re-sale was ordered, on the petition of the executors of a party who was surety to the creditor at whose instance the sale was had. And under the circumstances, the costs of the petitioners were ordered to be charged upon the estate.

Mr. *Crickmore* for the petitioners.

Mr. *Mowat*, contra.

Bozon v. Bolland, (b) *Ball v. Tunnard*, (c) *Attorney-*

General v. Corporation of Bristol, (a) Hepworth v. Heslop, (b) 1850.

were referred to. The facts are fully set forth in the judgment of

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ESTEN, V. C.*—This was a creditor's suit, and the plaintiff is the assignee of a creditor. The suit was instituted by a creditor on behalf of himself and all the other creditors of *Christopher Clarke*, the testator, who had in his lifetime borrowed £300 on mortgage of the greater part of his real estate: upon which occasion, one *Christopher Elliott* had joined him as surety in a bond for securing the debt. *Clarke* and *Elliott* are both dead. The decree directed the application of the personal estate to the payment of the debts, and if it should be insufficient for that purpose, then the sale of the real estate, or such part of it as should be necessary to supply the deficiency. The personal estate proved deficient, and a sale was had of the real estate under the decree, which directed that such sale should be subject to the dower of the testator's widow, who was one of the defendants. The lands sold were those comprised in the mortgage, in which the widow had joined for the purpose of barring her dower; so that in fact she was dowable only of the equity of redemption in these lands. The mortgagee agreed to join in the sale. Under these circumstances, it is obvious that the proper mode of conducting the sale so as to vest a good title in the purchaser, would have been for the purchaser to have paid the mortgagee what was due on his security, and to have taken an assignment of the mortgage to a trustee; in which case the widow must have tendered redemption before she could have been admitted to her dower; and the result would have been that she would have been dowable only of the excess of the value of the estate above the mortgage-debt. The conditions of sale, however, without alluding to any incumbrance, or to the situation of the estate, simply stated that the sale was to be subject to the title of dower of the testator's widow in the lands to be offered for sale. These conditions, although not in this respect absolutely incorrect, were calculated to mislead. The purchaser would naturally suppose that the lands were

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(a) 14 Sim. 648. (b) 3 Hare, 485.

* The Chancellor was not present at the argument.

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subject to no other incumbrance than the dower, and would consider that incumbrance as attaching to the entire estate, both legal and equitable. It is stated in the affidavit and not contradicted,—in fact it is admitted, that the purchaser at this sale actually did fall into this error, and offered considerably less than he otherwise would for the property. It is quite clear that relief ought to be given in such a case, and that a re-sale should be directed. The right of the petitioners, however, to apply to the court for this purpose, is denied. They are the executors of *Elliot*, the surety. After the death of *Clarke* and *Elliot*, the mortgagee commenced an action on the bond against the petitioners, and obtained judgment for the whole amount. Under this judgment they will be compelled to pay whatever is not realized on the sale, and therefore their testator's estate is damnified to the precise extent of the loss occasioned by the mistake which has been mentioned. That they are entitled to relief is unquestionable; and if they cannot obtain it upon this petition, they must institute a suit for the purpose; which would be monstrous. None of the cases cited are sufficient to shew that they are not entitled to make this application; and upon principle, I should think that they had the right. They are not strangers to the suit, which is instituted for the benefit of all the creditors of *Clarke*, amongst whom they are to be reckoned, since a judgment has been obtained against them for a debt, due from his estate. Moreover, they have a prospective interest in the mortgage itself, since if they paid the debt, they would be entitled to stand in the place of the mortgagee as to the security; and, I suppose, it cannot be doubted that the mortgagee could have made the present application, if it had been necessary for his protection. With regard to the costs, the purchaser, who is an innocent party, must have his costs: so must the petitioners, who have been compelled to make this application, by the mistake which has occurred without their fault. The plaintiff and defendants are not, I think, entitled to their costs, since they were parties to the preparing and settling the particulars and conditions of sale, the defectiveness of which has caused

this misapprehension. They ought not, however, to pay costs, and therefore the costs of the purchaser and the petitioners must be charged upon the estate. Let the order issue as prayed.

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PRENTISS V. BRENNAN.

Partnership—Injunction—Receiver.

Where a managing partner was charged, on affidavit of his co-partner, with excluding the latter from access to the books and papers of the partnership, and with not delivering to him accounts of the state of the business, which the partnership articles had stipulated for, an injunction and a receiver were granted against such managing partner, though the latter in his affidavit denied the principal charges against him, but not satisfactorily.

The facts of this case, and the points taken by counsel on both sides, appear fully in the judgment of the court. The motion was for an injunction and a receiver, and was made on notice served, by leave of the court, with the subpoena.

Mr. *Mowat*, for the plaintiff.

Mr. *Vankoughnet* and Mr. *Turner*, for the defendant.

The following are some of the cases cited: *Middleton v. Dodswell*, (a) *Huguenin v. Baseley*, (b) *Metcalf v. Pulvertoft*, (c) *Harding v. Glover*, (d) *Duckworth v. Trafford*, (e) *Davis v. Marlborough*, (f) *Greatrex v. Greatrex*, (g) *Peacock v. Peacock*, (h) *De Berenger v. Hammil*, (i) *Smith v. Jeyes*. (j)

THE CHANCELLOR.—The bill in this case has been filed for the dissolution and accounts of a partnership concern; and the present motion for an injunction and receiver comes before us upon affidavit. The exercise of the jurisdiction hereby invoked is almost always accompanied, in cases of this kind, with hesitation and regret. The court cannot fail to perceive that the disposition of the partnership effects in this way, and through the agency of a receiver, is likely to prove prejudicial to the interests of all; and in determining upon a course thus likely, almost certain to eventuate in some loss, the court is obliged, upon interlocutory motion, to choose between depriving one partner of his rights, the exercise of

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(a) 13 Ves. 269.

(d) 18 Ves. 281.

(g) 11 Jur. 1052.

(b) 15 Ves. 105.

(e) 18 Ves. 283.

(h) 16 Ves. 49.

(j) 4 Beav. 505.

(c) 1 V. & B. 180.

(f) 2 Swan. 138.

(i) 7 Jarm. Conv. 26.

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which may be of vital importance, or subjecting the dissentient partner to liabilities, possibly losses, to which, as he alleges, the defendant improperly seeks to subject him. But this jurisdiction, however embarrassing to the judge, must be exercised; unless indeed one partner is to be permitted to usurp the rights and property of all. Neither can it be doubted at this day, that it is competent to the court, and in accordance with well-established practice, to grant this relief upon affidavit and before answer, should the facts then appearing warrant such interposition.

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With respect to the particular case now before us, seldom do questions arise presenting so little difficulty either in law or fact. In this view, we felt it to be our duty, upon the argument of another motion in the cause, to express our regret that the defendant, upon having learned the true nature of his rights and liabilities under these articles, as we made no doubt he had learned, should not have rendered the continuance of this litigation unnecessary by the adoption of some one of the reasonable proposals made by the plaintiff; and we think it right now to repeat the expression of that regret, in the hope that the parties may see the propriety of terminating a litigation, which it would seem impossible to continue consistently with any thing like prudent advice.

The affidavits used upon this application are very voluminous; much more minute and extensive than was necessary for the purpose of this motion; and extend over the entire period from the commencement of the partnership to the time of making the motion. The facts which have determined my judgment are few and simple; they are of recent occurrence and satisfactorily established, and, in my opinion, entitle the plaintiff to the relief he now asks, without reference to the various points of minor importance which were much discussed during the argument. But before advert-
ing to such parts of these affidavits as seem to me pertinent, I wish to make an observation or two upon the articles of partnership; not for the purpose of putting a final construction upon the deed, or adjudicating upon rights

which may hereafter require more formal consideration, but for the purpose of explaining the course which I think the court bound to adopt, upon that construction of this instrument which, as at present advised, I consider correct. First, then, I think it plain, that the control and management of the concern were imposed upon the defendant as a burthen, and not conceded to him as a right or privilege. The plaintiff is represented as having been engaged long and successfully in business; the entire capital is furnished by him. The defendant had been for some time in the plaintiff's employment as clerk, and so continued until the formation of this partnership; he was, too, of tender years. Under such circumstances, one can discern no ground of right on which the defendant could require, and no ground of prudence on which the plaintiff could grant to him, the exclusive control of the concern. That which one would, *a priori*, have expected, seems to me to have been done by these parties. *Exclusive attention* to the partnership business is, as it seems to me, exacted from the defendant; but I find nothing in the articles to countenance the notion of an *exclusive right of control*. After determining the capital and duration of the partnership, the articles proceed, "for consideration that the sole control and management shall fall upon the said *Brennan*, said *Prentiss* agrees," &c. The deed then goes on to provide several benefits secured to the defendant by the plaintiff; and after reserving to *Prentiss* "*the privilege to devote any portion of his time and attention to securing or collecting his outstanding debts*," proceeds—"The said *Brennan* also binds himself not to permit any private affairs to prevent him from paying the strictest attention to the interest of the business which the said *Prentiss* places under his control; and although not the managing partner, said *Prentiss* further binds himself, at all times and in every way by which he can, to promote the interests of the company, and from time to time to afford the said *Brennan* such advice as the said *Brennan* may request or desire, in the performance of the duties which, from the nature of this agreement, shall devolve on him, the said *Brennan*." I am of opinion that the provisions of this

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As little reason have I been able to discover for the claim set up by *Brennan* to an exclusive right of control in winding up the affairs of this partnership. The defendant seems to have regarded this rather as a consequence of the exclusive right of management during the partnership than as directly provided for by the deed; and had the articles been viewed in their true light, it is more than probable that this claim would never have been advanced. But the language of the deed seems to me to leave no room for doubt. It provides that—"At the expiration of the term of partnership said *Brennan* agrees to furnish the said *Prentiss* with a correct statement in detail of the affairs of the company, and likewise to furnish a similar statement once in each and every year during the existence thereof, if it shall not interfere with the progress of the business. If it (the statement first alluded to) shews the firm to be solvent, said *Brennan* is first to pay its liabilities to others than the said *Prentiss*, and then next to pay the said *Prentiss* the amount in cash which he, the said *Prentiss*, shall have paid the said *Brennan* in cash, and (provided they are in possession of the said *Brennan*) the same amount of goods at their invoice cost, which the said *Prentiss* placed in the hands of the said *Brennan* at the commencement of the partnership. After having in that order discharged the debt of the firm, the remaining accounts, whether they consist of goods, outstanding debts, or any other kind of property, shall be equally divided," &c. I can discover nothing in this language to warrant the claim advanced by *Brennan*. The parties do not seem to have contemplated the continuance of the partnership beyond the time limited by the articles, *sub modo* even, for the purpose of collecting the debts and converting the assets; on the other hand, an immediate division of the debts and property is expressly provided for. The possibility that a further continuance of the partnership for such purpose might become necessary, no doubt may have

been, and probably was, foreseen ; something would in any event have to be done, and the parties seem to have agreed that the burthen of the active management, in winding up, as well as in conducting the concern, should be borne by *Brennan* ; but I find no trace of any intention to exclude *Prentiss* from assuming the control of a partner.

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Lastly, it is perfectly manifest, from the passage of the deed which I have just read, that it was the duty of *Brennan* upon the close of the partnership, to have furnished *Prentiss* with a statement in detail of the affairs of the concern.

Now, without entering into the detailed statements in these affidavits, very many of which, as I have said, are quite immaterial in disposing of this motion, it seems that the plaintiff advanced the full amount of capital stipulated by the articles, and, in addition, a sum of about £4,000. It is said that *Brennan* asserts the present liabilities of the firm to be about £700, and this is not denied. The partnership term expired in May, 1848, and has been since continued, as the plaintiff affirms, for the purpose of winding up the concern merely. This the defendant denies, though faintly ; and without weighing the precise testimony on each side, I may say that I have no doubt the fact is as stated by the plaintiff. Numerous expressions throughout the defendant's affidavit convince me of this quite as clearly as the current of events. The attitude of the parties during the continuance of the partnership, and at the time fixed for its dissolution ; subsequent occurrences ; and the present position of affairs—all lead to that conclusion. Under these circumstances, the case made by the plaintiff is in substance this :—that he had demanded of the defendant repeatedly since the period of the dissolution, the detailed statement provided for by the articles, and also access to the books and papers of the firm, all of which had been repeatedly refused by the defendant, he asserting a right to withhold such information until all the debts should have been paid ; that in the month of March last the defendant proposed to hand to the plaintiff the accounts of the firm, amounting, as he alleged, to about £7000, subject to claims against the firm amounting to about £700, in consideration of receiving

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1850. £2,500 ; and that he enforced the acceptance of the offer with a significant threat, while he at the same time refused to furnish the plaintiff with the information necessary to guide him in determining whether to accept or reject that offer. The plaintiff further alleges that the defendant has taken, and continues to take, securities for the partnership debts in his individual name, and that he has reason to apprehend a fraudulent intent, and consequent loss. This is, I think, substantially the case put forward by the plaintiff, but the mode in which the case has been met, makes it important to observe the particular language of the plaintiff's affidavit. The affidavit on this point runs thus:—

“And this deponent further saith, that he hath frequently of late renewed his application to the said *Brennan* for a statement of the affairs of the said partnership, which, however, the said *Brennan* hath never given to the deponent; the said *Brennan* alleging that he was not bound to give the same until all the liabilities of the partnership should be paid.”

The affidavit next states the particulars of the defendant's proposal alluded to a moment since, and proceeds: “And this deponent further saith, that the said *Brennan* did not at the time of making, or before making the offer, furnish this deponent with any list of the debts, or any statement as to the affairs of the said partnership; and this deponent, on hearing the said offer, expressed his surprise thereat, reminded the said *Brennan*, in effect, that the deponent had advanced to the partnership, capital and means to the extent of £10,000, and the said *Brennan* had always assured this deponent that the business was a profitable one; and this deponent added, in effect, that this deponent could not understand how the said *Brennan* could think of proposing such a settlement. And the deponent saith that he requested the said *Brennan* to furnish this deponent with a statement of the affairs of the partnership, and of the debts due to the same which he proposed this deponent should assume, and a statement showing the data on which he made the said offer, that this deponent might judge of the reasonableness of the offer so made to this deponent, and to let this deponent have the books and papers of the said

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partnership, that this deponent might examine into the affairs thereof for himself. And this deponent further saith, that the said *Brennan* declined to accede to these requests or any of them, and said in effect, that to accede thereto would be giving this deponent an advantage over him; that he, *Brennan*, had the advantage at present and would keep it, and that this deponent had better accept the offer, or he would have to do worse." And further on there is this statement: "And this deponent further saith that the said *Brennan* hath, ever since the occasion of the said offer and request, being respectively made as aforesaid, continued to refuse this deponent access to the books and papers of the partnership, and any information of the particulars or value of the debts, &c." I think I may say that this passage of the plaintiff's affidavit, contains as explicit a statement of his objection to the defendant's course of conduct as could have been desired: it admitted of an explicit reply. The plaintiff has shown that he repeatedly applied to the defendant for information to which he conceived himself entitled, or to be permitted to glean that information for himself by reference to the books and papers of the partnership, and that the defendant as often refused to comply with such requests. Now the information sought for by the plaintiff was such as under the circumstances he must have been most anxious to obtain, especially when called on to accept or reject the offer of the defendant. It is confessed that the plaintiff never acquired that information; and the question is, did he fail to obtain it in consequence of the defendant's assertion of right to withhold it and consequent refusal, or from his own disinclination to seek it in the books of the firm. That is the point which the defendant should have met. How has it been answered? The words of the defendant's affidavit are, "that from the commencement of the said partnership the books and papers of the said firm were always accessible to the said complainant, and this deponent never prevented or hindered him from access thereto." Now this passage admits of a two-fold interpretation. It may mean that this right to inspect the books and papers had not been the subject of controversy,

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had not been asserted by the plaintiff and denied by the defendant; or if asserted, that it had been acquiesced in, and that as a consequence, the defendant had not upon any particular occasion, and *a fortiori*, had not systematically refused to permit the plaintiff to exercise the right in question. Or it may mean that the plaintiff had never attempted to enforce his claim *vi et armis*, and that consequently the defendant had never prevented and hindered him from accomplishing his object—had never resisted force by force. If the former interpretation be the true one, then the defendant has fairly met the case advanced by the plaintiff. These affidavits are in direct conflict; and the court will be incapacitated from action unless there be further evidence, either internal, arising upon the documents themselves, or supplied from external sources sufficient to determine its judgment. But before determining the affirmations of these gentlemen to be directly and irreconcilably opposed, I have felt it right to examine carefully the defendant's affidavit, to satisfy myself whether the former interpretation be indeed the true one; and from the best consideration I have been able to give the subject, I am very clearly of opinion that the conclusion to be arrived at, from the affidavit itself, is that the defendant did not intend to affirm the passage quoted in that sense, and further, that the extrinsic evidence shows that such an affirmation would have been utterly inconsistent with truth. The very next sentence of the affidavit, (if indeed it be not the conclusion of the same sentence,) would seem either distinctly to admit or necessarily to imply these facts: that a controversy had arisen; that the plaintiff had asserted his right to inspect the books and papers; that the defendant had formed an opinion that he was himself entitled to an exclusive control in the management of the concern, and to the exclusive custody of the books and papers; and that the plaintiff had not in fact received the statement, or examined the books; thus reducing the point of issue to this, whether the plaintiff did in fact acquiesce in these usurpations of the defendant, or whether his course of conduct was such as to have given the defendant any just ground to conclude that he had so

acquiesced. The passage to which I have alluded is the following:—"But he, the said plaintiff, never availed himself of such access, *but appeared to this deponent, from the course he pursued*, to concur in the opinion of this deponent, that he was not entitled to the same, and to consider that as by the articles it was provided that he was only entitled to have statements of the affairs, and to have no control over the business, the same restriction applied to the books." Now, considering the reasonableness and propriety of the plaintiff's demand—considering the deep interest he had in its enforcement, and keeping in view the unfortunate attitude of hostility assumed by these parties, I should have required very clear evidence to convince me that the plaintiff had in fact acquiesced. Here, however, the defendant does not venture to assert that the plaintiff did in fact acquiesce; he only says that from his course of conduct he was led to believe he did. But he gives no information as to the particular conduct which generated that belief; and in the absence of details of conduct clearly leading to that conclusion, I think I would have been of opinion that the court could not give any effect to the allegation of the defendant's affidavit, in opposition to the explicit affirmation of demand and refusal made by the plaintiff. But in other portions of the defendant's affidavit, as also by extrinsic evidence, we have the defendant's course of conduct brought to light,—clearly evincing, not a refusal of the plaintiff's claim for information upon a single occasion, but the systematic exclusion of him from those sources of information which should have been equally open to both. When in the summer of 1849 the plaintiff demanded a statement, the defendant's reply, as found in his own affidavit, was the following:—"That when the liabilities of others were paid, he, this deponent, would furnish him therewith;" and further on,—“but that if he would assume the then existing liabilities of the firm, the particulars whereof were then known to him, he, this deponent, would at once go into the accounts.” And when either a statement of the affairs of the partnership, or an inspection of the books and papers, or probably both, was

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so necessary to enable the plaintiff to consider the prudence of accepting the defendant's offer of compromise, the statement was confessedly refused; and as to the books, he says that he informed the plaintiff *that without lengthened explanations they would be unintelligible*. But what places the matter beyond doubt in my mind, is the plaintiff's letter of the 24th of April, 1850. The information sought by the plaintiff was important to him; he confessedly neither received a statement nor saw the books. The defendant had formed an opinion that the plaintiff's claim was unfounded; and the allegation is that the defendant was led to believe, from the plaintiff's conduct, that he acquiesced in that opinion. Now, whatever room there may have been before for the conclusion at which the defendant says he had arrived, that letter ought to have sufficed to remove every shadow of doubt. The plaintiff says—"I feel that it is now time to bring the negotiations between you and myself as partners to a close. The only satisfactory way of doing this is to have stock taken, our assets and liabilities classified and ascertained, and a balance-sheet struck, shewing the exact position of our affairs. On this being done, our respective proportions in the business can be arrived at without difficulty; or if we should disagree, the points of disagreement can be submitted to arbitration. Instead of this, you decline exhibiting any statement, you refuse me access to the books, you insist on retaining the sole control and on winding up the business as you think proper." The letter expostulates with the defendant on the unreasonableness of his conduct, and repeats a demand of the statement and that the books and papers should be submitted to an accountant. Now, I think it impossible to characterise that letter as otherwise than a fair, candid statement, and forcible expostulation from one partner to another to avoid litigation; yet it elicits no explanation from the defendant; he neither complains that the plaintiff had misunderstood him in supposing him to have refused access to the books and papers, nor does he explain that he had himself misinterpreted the plaintiff's conduct; and practically things are allowed to continue in *statu quo* to

the hour of filing the bill—the statement is withheld and access to the books denied. 1850.

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Upon these considerations, I cannot hesitate to give credence to the plaintiff's allegation, that the defendant systematically excluded him not only from all control in winding up the partnership concern, but also from those sources of information which should have been placed within his reach. That is, I think, the just conclusion from all the evidence, and it would, in my opinion, be unfair to the defendant himself to assume that he intended to disaffirm it. Regarding the passage in the defendant's affidavit then, as intended in the latter sense, it is obviously immaterial. It disaffirms any attempt to enforce the plaintiff's rights by force, and denies that any such attempt was resisted; that is, it disaffirms and denies things not asserted by the plaintiff, and in no way necessary to his case. But I think it right to add that the passage in question is not only immaterial, but disingenuous in the extreme, tending very much to shake all confidence in the other portions of the affidavit.

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I have entered thus minutely into the allegations in these affidavits respecting the point upon which my judgment chiefly proceeds, because I am deeply sensible of the great care and prudence requisite in the exercise of this very delicate jurisdiction, and am anxious not only to satisfy my own mind as to the course which ought to be pursued, but further to state distinctly the reasons which have influenced my judgment. For the same purpose I shall make a few observations upon one or two other points of the case.

The plaintiff alleges, as I before observed, that the defendant pressed the acceptance of the offer made by him, with something very much resembling a threat, "that the plaintiff had better accept the offer or he would have to do worse." If the defendant did really intend to intimate an intention of improperly dealing with the accounts of the firm, (which seems to have been the impression, not unnatural, made upon the plaintiff's mind,) it were superfluous to say that, under existing circumstances, such a threat would form a very material circumstance in the determina-

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tion of the motion. Now the defendant, in explaining what he affirms to have taken place on this occasion, says—"And this deponent also said that he, holding the property of the firm, and knowing more of the business and debts than the said complainant or any other person, he, this deponent, possessed great advantage, and in the event of no amicable settlement being arrived at, he would necessarily be placed from these circumstances more advantageously than otherwise he could be, and that he would not willingly do any thing that would in his opinion lessen his chance of obtaining a fair compensation for the numerous breaches of covenant on the part of the said complainant." The first observation which I would make upon this passage is, that it seems to me to afford the strongest confirmation of the plaintiff's charge of exclusion. It neither affirms or disaffirms the charge directly, and yet it does—indirectly indeed, but for that reason most convincingly—admit an intention to do that of which the plaintiff complains. Some information the defendant certainly had respecting the affairs of this co-partnership, the knowledge of which would have been important to the plaintiff, (else it could be no advantage to the defendant to withhold it,) which was notwithstanding withheld, for an indirect and improper purpose.

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The second observation which occurs to me is, that if this passage is not to be considered as a threat, it certainly does convey a very intelligible hint that the defendant felt the plaintiff to be in his power, and that he designed to use that power for the purpose of securing for himself terms which the plaintiff was not likely otherwise to assent to.

But viewed without any reference to its bearing upon other parts of the affidavit, and in the connexion in which the defendant has placed it, one cannot but feel the difficulty of reconciling the facts there disclosed, with those principles which should have governed the defendant's conduct. This gentleman, placed in a position of great trust—not only the partner of the plaintiff, but in some sense his paid agent; bound in this double capacity to make every tittle of information acquired in this business availa-

ble for the interest of the plaintiff—this gentleman describes himself as pressing upon the acceptance of his copartner, a proposition for the final settlement of partnership transactions extending over a period of seven years, and involving very considerable pecuniary interests, whilst refusing to furnish any statement of the affairs, and denying to his co-partner all access to the books; and he describes himself as enforcing the acceptance of what he has chosen to term “an amicable settlement,” by reference to some undefined advantage, which the knowledge acquired by him in his confidential position conferred, and of which he purposed to make some undefined use, advantageous to himself, and prejudicial to the plaintiff. Surely it is not to scrutinise these transactions too nicely to observe that they proceeded upon an utter forgetfulness of the principles which ought to have governed the defendant’s conduct.

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With respect to the charge of taking securities for partnership debts in the individual name of the managing partner, that is admitted by the defendant; but he alleges that it was known to the plaintiff and not objected to. Upon the only occasion, during the continuance of the partnership, when a knowledge of this practice was brought home to the plaintiff, he is shown, I think, to have objected. Yet though it had not been so, such knowledge and acquiescence as is asserted, could not justify the taking such securities at a recent date, after difficulties had supervened, and whilst the right of the plaintiff to inspect the record of the partnership transactions was denied. It is said that the security was so taken for convenience. I am at a loss to discover how a *cognovit* in favour of Mr. *Brennan* was in any respect more convenient than one in the name of *Brennan* and *Prentiss*. I think the proceeding wrong, and without justification.

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The refusal of the defendant to furnish a copy of the articles has been denied. But it is material to observe that the defendant had in fact the only copy extant.

Viewing this case then by the light of reason only, and without reference to authority, one would find it difficult to maintain that the circumstances are not sufficient to

1850. justify the exercise of this jurisdiction. Here one partner has usurped the rights and property of the firm; he has excluded his partner not only from any share in the control, but from the means of acquiring any knowledge of the partnership affairs. In these circumstances, securities for partnership debts are taken in the name of the managing partner; and all this is done with respect to a firm, in winding up the affairs of which two years had been already occupied, and by a person holding confessedly no claim to any thing in the shape of profits, the assets being insufficient to repay to the plaintiff the amount of his advances. If this be not a proper case for a receiver and injunction, it would in my opinion be difficult to imagine one.

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It was argued, however, that the exercise of this jurisdiction under existing circumstances would be unprecedented; and this argument was justified by reference to the various dicta and decisions of Lord *Eldon*. I have not been able to discover any thing decided by Lord *Eldon*, or any other judge, contrary to the course which reason and justice seem to me to dictate as proper in this case. On the contrary, were it necessary to appeal to authority in a matter so plain, it is to what Lord *Eldon* has repeatedly said and done that I should refer. In *Const v. Harris*, (a) that learned judge observes—"In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other; they are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded; what weight is to be given to it is another question. The most prominent point on which the court acts, in appointing a receiver of a partnership concern, is the circumstance of one partner, having taken upon himself the power to exclude another partner from as full a share in the management of the partnership, as he, who assumes that power, himself enjoys." And in *Wilson v. Greenwood*, (b) the same judge observes—"And as in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which

(a) T. & R. 525.

(b) 1 Swan. 481.

he is entitled to take, the court will grant a receiver ; so in the course of winding up the affairs, after the determination of the partnership, the court, if necessary, interferes on the same principle." (a)

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Upon authority, therefore, as well as in justice, I think that this motion must be granted, and with costs.

JAMESON, V. C., concurred.

ESTEN, V. C.—In this case, the plaintiff and defendant entered into partnership for five years from the 1st of April, 1843, under written articles of co-partnership. The conduct of the business was to be committed entirely to the defendant ; but the plaintiff was to have annual statements of the affairs of the firm, and was to be furnished with a similar statement at the expiration of the co-partnership. He likewise engaged to supply the defendant with advice in the management of the business, when required, and not during the term to embark in any dry goods business, or in any other business, by which the interests of the co-partnership would be prejudiced. It was further agreed, that the partners should not use the name of the firm as endorsers, or drawers, or acceptors of any bills or notes for the accommodation of any person or persons, whose names they should not require to borrow on their own paper, for their own accommodation, in return ; and the defendant was not to be at liberty to use his own name in such capacity, without the consent of the plaintiff. The business was conducted under these articles by the defendant, during the five years limited by the agreement for that purpose, and it is not clear that it has not been continued since that time, until the commencement of the present suit. The bill prays a dissolution, if it have not already taken place ; for a general account and arrangement of the co-partnership affairs ; an injunction and receiver. The present application is, that an injunction may issue and a receiver be appointed. I have read the affidavits with great attention, and have looked at all the cases that were cited, and it appears to me to be clearly established that, during the term and afterwards, before the summer of 1849, the plaintiff

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(a) Smith v. Jeyes, 4 Beav. 503 ; Madgwick v. Wimble, 6 Beav. 495.

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evinced a desire to be furnished with a statement of the affairs of the co-partnership, and that the defendant did not comply with that wish, saying that all was right, whereby the plaintiff was induced to acquiesce; that in the summer of 1849, a distinct demand of such a statement was made by the plaintiff, and refused by the defendant, until all the debts should be paid, on a ground which was frivolous and untenable; that in March last, the plaintiff did what was equivalent to making a request to see the books, and have a statement, and that the defendant in effect refused it, assigning for a reason that he had an advantage, from knowing more than the plaintiff, which he was desirous to retain; and that a distinct demand was made of a statement, and of access to the books, in the presence of the defendant's brother, which was not complied with. In short, it appears to me that there has been, in this case, a continued exclusion of the plaintiff from that share in the business to which he was by the articles and the rules of law entitled, sufficient to warrant a dissolution, if the term had not expired, and consequently sufficient to authorise the court to issue an injunction and appoint a receiver, if no obstacle exists to its interposition for that purpose, inasmuch as such conduct is totally destructive of the confidence which should subsist between partners, and renders it impossible that the business should either be carried on or wound up in a proper manner, without the intervention of the court. For instance, if this motion should be refused, or granted only to the extent of compelling statements to be furnished, and access to the books to be allowed, the business will be wound up by Mr. *Brennan*; but the plaintiff would have a right, if he saw any thing wrong or improper, to object and expostulate, and express his dissent. The defendant would have no right to wind up the business, to the total exclusion of the plaintiff; but how could they co-operate in any degree for this purpose after the course which the defendant has pursued towards the plaintiff? There are other circumstances too, which support this application. The representations of the prosperous condition of the business, so inconsistent with the offer made by the

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defendant to the plaintiff, are not satisfactorily denied; and the defendant has confessedly taken securities and conveyances of property, belonging to the firm, in his own name. The circumstances relied on by the defendant, as affording a ground of objection to the present application, are, that the plaintiff improperly embarked in speculations in flour and wheat, and in the course of this business accepted drafts; that he likewise endorsed bills and notes for the accommodation of other persons, for which he received a consideration, and thereby and by means of losses which he consequently sustained, consumed and impaired his own credit, and limited and injured that of the firm; that he engaged in the sale of dry goods, in contravention of the articles; that he refused to advise, or co-operate or hold communication with the defendant; that he disregarded his covenant to promote the interests of the firm, at all times and in every way; and that he harrassed and annoyed the defendant, and by his conduct rendered his efforts unavailing to make the business profitable. Upon these points it appears to me that the plaintiff was entitled to carry on any business, and to accept drafts and endorse bills and notes for the accommodation of other persons, provided it was attended with no injury to the interests of the firm. Whether such was the case or not could be known only to defendant, whose duty it was, under such circumstances, to remonstrate; but by his own statement, it appears that the first time he noticed these circumstances was in the month of November, 1847, four months before the expiration of the partnership, and four years and eight months after it had been formed. Moreover, it does not appear that they were attended with any injurious effect to the credit of the firm, for it is stated in the defendant's affidavit that in the month of November, 1847, he "unexpectedly and suddenly" found, that he could not obtain reasonable accommodation at the Commercial Bank; which may have arisen from causes altogether different from any injury to the credit of the firm, and, together with other circumstances mentioned in the same part of the affidavit, seem to indicate that until that time no difficulty had been

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experienced in obtaining the requisite amount of credit. With regard to the sale of dry goods by the plaintiff, although the defendant says that the plaintiff had been in the habit of acting in that way from the commencement of the partnership—of which we may suppose the defendant to have been aware, as he says nothing to the contrary—he does not state that he ever remonstrated with the plaintiff on the subject, and therefore we must suppose that it was done only to a small extent, and in a manner not injurious to the interests of the firm, and that the defendant acquiesced. The alleged refusal of the plaintiff to advise or co-operate, or hold communication with the defendant, and his alleged endeavours to harrass and annoy the defendant, and by his conduct frustrating the defendant's efforts to make the business profitable, are not entitled to much attention. It is incredible that the plaintiff should not have desired, at all times and in every way, to promote the interests of a firm in which he had the principal interest, or could seriously have intended to harrass or annoy the defendant in his conduct of the business, or to act in such a manner as to defeat his efforts to make the business profitable. The refusal to advise and co-operate may have arisen from confidence in the defendant, or from disagreement. It appears that no intercourse took place between these parties during the greater part of the time between the formation of the partnership and the autumn of 1847. This must have arisen from a quarrel, to which two persons must be parties, although the defendant has suppressed all mention of the cause which led to this state of things. With regard to the agreement in May, 1849, each party complains that it has been infringed by the other; and it is impossible to determine how the matter stands in that respect. It cannot therefore influence the determination of the present question. The defendant states that in the summer of 1849, the plaintiff received sums of £175, £20, and other sums, from debtors of the co-partnership, without communicating the fact to the defendant. But it must be remembered that at this time, the plaintiff deemed himself entitled to receive the moneys due to the firm. The defendant having acted in a manner

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which, in my judgment, entitled the plaintiff to the interposition of this court, he nevertheless endeavours to settle the matter amicably; negotiates with, and makes proposals to, the defendant, and takes the defendant's offer into consideration. These attempts at a settlement failing, he has a right, I think, to apply to this court for its aid in enforcing his rights. The partnership may possibly have continued until the commencement of the suit, in which case it became determinable on notice. Under such circumstances, the plaintiff, being denied the rights of a partner, is entitled to institute a suit in this court for a dissolution and account; and the case being such as, if the term had not expired, the plaintiff would have been entitled to a dissolution, and an injunction and receiver, he is, under the actual circumstances of the case, entitled to the whole or part of that relief, as occasion may require. In short, this being a case in which a dissolution would be decreed, if necessary, it is one in which an injunction and receiver ought now to be granted.

I think, therefore, the motion should be granted with costs.

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GOOD v. ELLIOTT.

Practice—Impertinence—Insufficiency.

When an answer is referred for impertinence, and the master's report thereon is procured within the time limited for excepting for insufficiency, the plaintiff has still the full time to except for insufficiency.

The grounds of the present motion, the arguments of counsel, and the authorities cited, appear sufficiently in the judgment of the court.

Mr. *Strong* for the plaintiff.

Mr. *Crickmore* contra.

THE CHANCELLOR.—In this case, the answer was referred for impertinence, and reported impertinence within the time allowed for excepting for insufficiency. Exceptions were then filed for insufficiency within a month from the master's report of impertinence, but not within a month from the filing of the answer. The object of the present application is to discharge these exceptions for irregularity, as being filed after time. It appears that before the orders of 1828, if an answer were referred for impertinence and reported

1850. impertinent within two terms and the ensuing vacation, which was the time allowed for filing exceptions *nunc pro tunc* as of course, it might be excepted to for insufficiency at any time within the same period, computed from the date of the master's report of impertinence; in other words, the time for excepting to the answer for insufficiency in such a case, dated from the report of impertinence and not from the filing of the answer, upon the principle that until the impertinent matter was expunged, it could not be known what the answer really was, or whether it was sufficient or not. (a) After the introduction of the orders of 1828, it was decided that if the time for excepting to a further answer for insufficiency expired, and the answer was afterwards referred for impertinence and reported impertinent, the time for excepting for insufficiency was not thereby revived; and it was said that a reference for impertinence, after the answer was to be deemed sufficient, was irregular. (b) On the other hand, the Vice-Chancellor of England, in the case of *Bradbury v. Booker*, (c) decided that the fourth order of 1828, applied only to exceptions for insufficiency, and refused to discharge an order referring an answer for impertinence, granted after the expiration of the time for excepting to it for insufficiency. It appears very clearly from the cases that were cited in the argument, and all of which have been attentively considered, that there can be no reference for impertinence after exceptions for insufficiency; and that the exceptions for insufficiency filed pending a reference for impertinence operate as a waiver of it. The principle is, that as exceptions for insufficiency necessarily pre-suppose that it has been ascertained what the answer really contains, and as this cannot be the case so long as it is uncertain whether it is impertinent or not, a reference for impertinence can neither follow nor accompany exceptions for insufficiency. The same inconsistency does not perhaps arise, when the time for excepting for insufficiency has been suffered to elapse, and the answer is afterwards referred for impertinence; and yet it is extremely doubtful

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(a) *Dyer v. Dyer*, 1 Mer. 1. (b) *Jeffray v. McCabe*, 1 R. & M. 739.
(c) 4 Sim. 325.

whether a reference for impertinence can be allowed after the answer is to be deemed sufficient. No case, however, decides, that where an answer has been referred for impertinence, and reported impertinent within the time allowed for excepting for insufficiency, the time for taking that step does not commence still, as it certainly did before the introduction of the orders of 1828, from the report of impertinence. Mr. *Smith*, in the first volume of his *Chancery Practice*, at page 287, states the practice to be so; and we think that the rule is a reasonable one. When a defendant introduces impertinent matter into his answer, and the plaintiff proceeds promptly to procure it to be expunged, it is reasonable that he should have the full time for excepting to the answer for insufficiency, after he has ascertained what it really contains; and if the defendant is delayed by this proceeding, it is his own fault. This rule, however, does not apply unless the report of impertinence is procured within the time for excepting for insufficiency; for if that time should expire before the report of impertinence is obtained, the answer is thenceforth to be deemed sufficient, whatever may become of the reference for impertinence. Again the time is not extended if the master's report should be in favour of the answer. Thus a reasonable opportunity of excepting for insufficiency is afforded to a plaintiff, who has proceeded promptly, and succeeded in his reference, while a wholesome check is imposed upon references for impertinence, and the incentive to promptitude and despatch is carefully preserved. We think, therefore, that these exceptions are regular, and that this motion must be refused; but inasmuch as Mr. *Daniel* states a different rule from the one which we have collected from the authorities, and upon which we are acting, it must be without costs.

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THE QUEEN V. STRONG.

Indian lands—Statutes 2nd Vic., ch. 15, s. 1, and 12 Vic., ch. 9, s. 1., construction of—Evidence.

Under the statute of 2nd Victoria, chapter 15, section 1, parol testimony by one witness deposing, to the best of his belief only, to the appropriation of the lands in question to the residence of Indian tribes, and to the non-cession of such lands to her Majesty, is sufficient *prima facie* evidence of those facts.

In regard to lands in the occupation of the Indians, it is unnecessary, in the proceedings of the commissioners, under the statutes 2 Victoria, ch. 15, and 12 Victoria, ch. 9, or by express evidence to negative the exceptions specified in the latter of those statutes.

The finding of the commissioners under those statutes, is not bad for not adjudging that possession should be relinquished by the trespasser.

This was one of several appeals from the judgment of commissioners under the statutes 2 Victoria, chapter 15, and 12 Victoria, ch. 9.

The petition filed in this matter stated that the petitioner was by a summons served in October, 1849, called upon by *David Thorburn* and *Charles Bain*, Esquires, to appear before them on the 26th of the same month, to answer to a charge contained in such summons, a copy of which was set

Statement. forth, and was as follows:—

“*Province of Canada, Gore District: to wit. To James Strong, presently residing on the Indian Reservation in the township of Tuscarora, in the said district, yeoman.*

“Whereas you have this day been charged before us, *David Thorburn* and *Charles Bain*, Esquires, two of the commissioners appointed to carry into effect the provisions of the statute of Upper Canada, 2nd Victoria, chapter 15, intituled ‘An act for the protection of the lands of the Crown in this province from trespass and injury,’ and also an act of the provincial parliament of Canada, passed in the 12th year of her Majesty’s reign, chapter 9, intituled ‘An act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the 2nd year of Her Majesty’s reign, intituled ‘An act for the protection of the lands of the Crown in this province from trespass, and injury, and to make further provision for that purpose;’ on the oath of one credible witness that you, the said *James Strong*, have unlawfully entered upon and possessed yourself of a portion of the Indian lands, being the south half of lot No. 35, in the 3rd concession in the said township of

Tuscarora and district aforesaid, and still continue unlawfully to occupy the same, these lands being a part of the reserved lands of, and belonging to, the Six Nations of Indians in the township and district aforesaid, and reserved for their especial use and benefit, such possession being illegal and contrary to the provisions of the aforesaid statute for the protection of such Indian lands. These are therefore to require you, by the authority vested in us as commissioners, to appear before us at Newport in the township of Brantford, in said district, on Friday, the 26th day of October, at the hour of eleven o'clock, a. m., of the same day, within the inn of Matthias Wilson, to answer the said charge, and to be dealt with according to law. Herein fail you not.

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“Given under our hands and seals the twenty-third day of October, in the thirteenth year of Her Majesty’s reign, and in the year of our Lord, 1849.”

That the petitioner duly appeared to such summons on the day named, when Messrs. Thorburn, Bain and Clench, (the commissioners,) after hearing the evidence, in the judgment or conviction of the commissioners set forth, decided and adjudged, that the petitioner was illegally occupying, or in possession of, the south half of lot No. 35, in the 3rd concession of the township of Tuscarora, in the district of Gore; and in pursuance of such decision, the said commissioners afterwards drew up a judgment or conviction in the words following:

Statement.

“*Province of Canada—Gore District, to wit.*—Be it remembered that on the 23rd day of October, 1849, at Newport, in the township of Brantford, in the district of Gore, *Peter Smith*, of the township of Onondaga, in the said district, Indian interpreter, personally came before us, *David Thorburn* and *Charles Bain*, Esquires, two of the commissioners under and by virtue of that certain statute of that part of the province of Canada formerly called Upper Canada, passed in the second year of the reign of Her Majesty Queen Victoria, intituled ‘An Act for the protection of the lands of the Crown in this province from trespass and injury,’ and also of a certain other statute of the province

1850. of Canada, passed in the twelfth year of the reign of Her said Majesty, intituled ‘An act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the second year of Her Majesty’s reign, intituled ‘An act for the protection of the lands of the Crown in this province from trespass and injury, and to make further provision for that purpose;’ and informed us that *James Strong*, of the township of Tuscarora, in the said district of Gore, in the said province, not being one of the tribes of Indians hereinafter mentioned, had possessed himself of, and was at the time of the said information still occupying and in possession of that certain piece or parcel of land, being the south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, in the said district of Gore, the same being part of a parcel or tract of land appropriated for the residence of certain Indian tribes in that part of this province heretofore constituting the province of Upper Canada,—that is to say, the Six Nations Indians, and for the

Statement. cession of which to Her Majesty no agreement had been made with the tribes occupying the same; and that he, the said *James Strong*, refused to remove from the occupation thereof, whereupon the said *James Strong*, after being duly summoned to answer the said information and complaint, duly appeared before us pursuant to the said summons, and having heard the matters in the said information, declared he was not guilty of the said matters. Whereupon we, the said commissioners, did proceed to enquire into the truth of the matter in the said information contained, and then, on the day and at the place in the said summons mentioned, that is to say on the 26th day of October, A.D. 1849, at Newport, in the township of Brantford, in the said district, one credible witness, to wit, *Peter Smith* aforesaid, upon his oath deposeth and saith in the presence of the said *James Strong*, that the said *James Strong* is not one of the Indian tribes aforesaid, and that he, the said *James Strong*, as the deponent verily believes, at and before the time of making the said complaint, was in the possession and occupation of the same parcel of land from that time to and until the examination of this deponent; he, the said *James*

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Strong, as this defendant verily believes, having no right or title whatever to the said land or to occupy or possess the same, the said land being a part of the parcel or tract of land aforesaid, as he, this deponent, verily believes, and appropriated for the residence of the said Indian tribes, and that the said tract was and is in the occupation of the said tribes, and that no agreement for the cession of the same tract to Her Majesty hath, as this deponent verily believes, been made with the tribes occupying the same; and that the said *James Strong*, being called upon, admits that he was then on the said south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, and stated that he would continue to work upon the same, and that he was working the said land for his father; and one *Frederick John Cheshire* having been called as a witness, by and on behalf of the said *James Strong*, the said *Frederick John Cheshire* upon his oath deposeth, and saith that the said *James Strong* requested him, this deponent, to produce a letter from the civil secretary, of date Oct. 1845, which this deponent hath not now at the time of his examination in his possession; that deponent will have to hunt for the same among his papers; that there are other papers bearing upon this case which deponent cannot particularise, and which he cannot at present produce. Therefore it manifestly appearing to us, commissioners as aforesaid, that the said south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, was and is land appropriated for the residence of the said Indian tribes, and for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same; and that the said *James Strong*, not being one of the Indian tribes as aforesaid, before the making of the said information as above stated, and from thenceforward continually to and until this time, has illegally possessed himself of and is in unlawful possession and unlawful occupation of the same land, contrary to the form of the statutes aforesaid; we do hereby find and determine that the said *James Strong* did illegally possess himself as aforesaid of the land aforesaid, and that he hath continued from thence hitherto, and still is in the unlawful

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1850. possession and occupation of the same land contrary to the form of the statutes aforesaid. Given under our hands and seals the 26th day of October, A.D. 1849.”

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That after the 26th October, and before the service of the notice of appeal thereafter mentioned, the petitioner was served with a notice of such judgment or conviction, signed by the said three commissioners, in the words and figures following, that is to say :

“*Province of Canada, Gore District, to wit.* To *James Strong*, residing in the township of Tuscarora, in said district : you are hereby required to take notice that we have, on the evidence produced before us this day, found and determined that you are illegally occupying, or otherwise in illegal possession of, the south half of lot No. 35, in the 3rd concession of the township of Tuscarora, in the district of Gore, in the said Province, the same being and forming a part or portion of the lands appropriated for the residence of certain Indian tribes in that part of this province heretofore constituting the province of Upper Canada—that is to say, the Six Nations Indians—and for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same : we, *David Thorburn, Joseph B. Clench*, and *Charles Bain*, Esquires, three of the commissioners appointed in pursuance and under the provisions contained in a certain act of the provincial parliament of that part of this province heretofore constituting the province of Upper Canada, made and passed in the second year of the reign of her present Majesty, intituled ‘An act for the protection of the lands of the Crown in this province from trespass and injury,’ and also an act of the provincial parliament of Canada, passed in the 12th year of Her Majesty’s reign, chapter 9, intituled ‘An act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the 2nd year of Her Majesty’s reign, intituled ‘An act for the protection of the lands of the Crown in this province from trespass and injury, and to make further provision for that purpose,’ do hereby require you to remove from the occupation or possession of the above mentioned land, within the space of thirty days from the day of the

Statement.

service of this notice. Given under our hands, this twenty-sixth day of October, in the year of our Lord, 1849.”

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That the said notice was the only notice of such conviction or judgment which the petitioner received until after the service of the notice of appeal, but after the service of such notice, the said conviction or judgment in the form hereinbefore set forth, was by the said commissioners placed on the files of this honourable court.

That the petitioner, on the twenty-second day of November, 1849, served the said commissioners with a notice of appeal from the said judgment, decision and conviction, to this court, pursuant to the said statutes in the said summons, conviction and notice mentioned.

That the petitioner was advised that the said judgment and conviction of the said commissioners were erroneous, and appealed therefrom to this court: for the following reasons :—

1. Because the evidence adduced before the said commissioners, as appears by the said judgment or conviction hereinbefore set forth, was and is insufficient to sustain the said judgment or conviction, and in particular the alleged trespass was not proved against the petitioner by legal evidence, and also it was not proved by any legal or sufficient evidence that the said premises formed a part or portion of the lands appropriated for the residence of certain Indian tribes in that part of the province heretofore constituting the province of Upper Canada; that is to say, the Six Nations Indians, and for the cession of which to her Majesty no agreement hath been made with the tribes occupying the same, as stated in the said notice of the 26th of October, 1849.

Statement.

2. Because in fact the said land has been long ago ceded and surrendered by the Six Nations Indians to the government of this province, as will appear if this honourable court will cause the fact to be enquired into, under, and by virtue of the said act of 2nd Vic., ch. 15; but the evidence of such surrender your petitioner did not, and could not adduce before the said commissioners, the same being in the possession of the said court themselves or the Indian depart-

1850. ment, or some public department office of the government of this province.

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3. Because it was not proved on the occasion aforesaid that no grant, lease, ticket of location, or purchase or letter or license of occupation had been issued for the said premises, so as to give the said commissioners power to act in the said matter under and according to the said first section of the said act of 12 Vic., ch. 9.

4. Because the said conviction is bad; for that the said premises are not described, either in the said summons, notice, or judgment, or conviction, as land for which no grant, lease, ticket, either of location or purchase, or letter or license of occupation hath been issued, and from all that appears from the said summons, notice, and judgment or conviction, some such lease, ticket or letter of license may have issued.

Statement. 5. That in fact the petitioner, and those under whom he claims, have held and occupied the said premises under license and permission of the government of this province, and so it would appear if this honourable court would cause an enquiry to be made into the matter, and permit evidence thereof to be given, but the petitioner was unable to prove such fact before the said commissioners, because all the documents relating to the said premises and other lands in the same township were long ago given up by the settlers on the said lands to the commissioners at their request, with a view to a settlement and adjustment of the claims of the said settlers to the said lands, and the question of their title thereto, but which settlement or adjustment has never taken place.

6. That the said summons and conviction are bad in form, for following and being according to the words of the first section of the said act of 2 Vic., ch. 15, which section is in part repealed, and not according to the words of the first section of the said act of 12 Vic., ch. 9.

7. That the said summons, notice, and conviction, purport to be made in pursuance of both the said acts of parliament, but do not shew that the said commissioners had, or if so, how they professed to have any jurisdiction in the matter under the said act of 12 Vic., chap. 9, and are

for that reason bad in form, and because the said summons, notice and conviction, are for many other good and sufficient reasons bad in form. 1850.

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8. Because the evidence of the said *Peter Smith* in the said judgment or conviction mentioned, does not establish that there was no agreement to cede any part of the said lands in Tuscarora to Her Majesty³, but he the said *Peter Smith* states on his belief only, that there was no agreement to cede the whole of the said lands; and, therefore, upon the said deposition of the said *Peter Smith* the said commissioners were not warranted in determining that there was no agreement to cede the land in question in this matter to Her Majesty.

9. Because for any thing that appears in the said judgment or conviction of the said commissioners, the said land in question may have been ceded or agreed to be ceded to the Crown before the commencement of the reign of Her present Majesty.

10. Because the said commissioners have not found or determined that there were or are any tribes of Indians occupying the said lands and claiming title thereto, and because occupancy alone by any such tribe or tribes, without any claim of title, is not sufficient to give the said commissioners jurisdiction under the said statutes or either of them. Statement.

11. Because there is no time stated in the said judgment or conviction, as the time when the petitioner did take or was in such alleged illegal possession of the said premises.

12. Because there is no sufficient evidence to bring the said case within the jurisdiction of the said commissioners or either of them, and because there was no sufficient evidence to sustain the said judgment and conviction.

13. Because the proceedings of the said commissioners are otherwise illegal, informal and incorrect.

The prayer of the petition was, that this court might annul the said decision of the said commissioners, or order such further enquiry to be made, or direct such issue at law to be tried, as to the court might seem meet, and that the said commissioners might be ordered to pay the costs of the

1850. petition in the matter aforesaid, and in the matter of the appeal, or make such order and direction in respect of the said costs as to the court might seem meet.

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Mr. *Cameron*, Q. C., and Mr. *R. Cooper* for the appellant.

The act of 2nd Victoria, chapter 15, empowers the commissioners to receive information, &c., as to the lands, for the cession of which to Her Majesty no agreement has been made; and the 12th Victoria, chapter 9, extends the jurisdiction to all lands for which no grant, letter or license of occupation, &c., has been issued, repealing for that purpose the provisions of the former statute. So much of the former statute as restricts the jurisdiction is repealed by the latter, and the two acts must be taken together—indeed the commissioners profess to have acted under both.*

Argument.

*By sec. 1, of 2d Vic., chap. 15, after reciting that the lands appropriated for the residence of certain Indian tribes in this province, as well as the unsurveyed lands, and lands of the Crown ungranted, and not under location or sold, or held by virtue of any lease or license of occupation, have, from time to time, been taken possession of by persons having no lawful right or authority so to do; and that the said lands have also been from time to time unlawfully entered upon, and the timber, trees, stone, and soil, removed therefrom, and other injuries have been committed thereon; and that it is necessary to provide by law for the summary removal of persons unlawfully occupying the said lands, as also to protect the same from future trespass and injury; it is enacted, "That it shall and may be lawful for the Lieutenant-Governor of the province, from time to time, as he shall deem necessary, to appoint two or more commissioners under the great seal of this province, to receive information, and to enquire into any complaint that may be made to them or any of them against any person, for illegally possessing himself of any of the aforesaid lands, for the cession of which to Her Majesty no agreement has been made with the tribes occupying the same, and who may claim title thereto, and also to enquire into any complaint that may be made to them or any one of them, against any person for having unlawfully cut down or removed any timber, trees, stone, or soil, on such lands, or having done any other wilful and unlawful injury thereon."

The 1st section of 12th Vic., chap. 9, after reciting that it is expedient to explain and amend the 2nd Victoria, chap. 15, enacts, "that so much of the first section of the said act as doth or may in anywise limit or restrain the provisions thereof, or the jurisdiction of the commissioners appointed, or to be appointed, under the authority of the same, to lands, for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto, shall be, and the same is hereby repealed, and that the said act and all the provisions thereof shall extend, and shall be construed to extend to all lands in that part of this province called Upper Canada, whether such lands be surveyed or unsurveyed, for which no grant, lease, ticket, either of location or purchase, or letter or license of occupation hath been, or shall have issued, either under the great seal or by or from the proper department of the provincial government to which the issuing of the same at the time belonged, and whether such lands be part of those usually known as crown reserves, clergy reserves, school lands or Indian lands, or by, or under any other denomination whatsoever, and whether the same be held in trust, or in the nature of a trust for the use of the Indians, or of any other parties whomsoever."

The convictions should have used the words of the recent act, whereas they speak of lands which have not been ceded; but say nothing of the lands being lands for which no grant, location ticket, &c., have been issued. The exception of the clause which is in part repealed, is negatived, but the exception of the recent act—the law now in force—is not negatived. A conviction under a statute must negative the exceptions contained in it. (a) It was also necessary to use the words of the statute as to the claim of title. The lands are spoken of in the statutes as lands occupied by tribes who *claim title thereto*, but the conviction speaks of occupancy only.

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Another exception, which it was equally necessary for the conviction to negative, is that respecting the cession to the Crown. The lands are to be those for which no agreement for cession has been made on the part of the Crown with the tribes occupying them. The conviction says there has been no agreement with Her Majesty; but for all that, they may have been ceded to any of Her Majesty's predecessors. The act itself shows the necessity for negating this exception, for in the form given for the writ of removal, the words, "our predecessors," are inserted, and the same words are used in the form B., for the writ of *feri facias*. The recitals in these forms describe the land as "not ceded to us or our predecessors." But in the conviction it is not stated but that the lands have been ceded to Her Majesty's predecessors, and it seems in fact that they have.

Argument.

But the evidence on which the convictions purport to be made is clearly insufficient. It is the mere information and belief of one witness. He believes the fact for no reason that he gives us; and his information he may have got any where; it is no evidence on which a court should proceed to evict settlers from their homes. The evidence on which to found such a conviction should be, as in all other like cases, the best evidence, and the documentary evidence as to the title to these lands, the officers of the Crown could produce, but the settlers could not.

The statute is a penal one, for it empowers the commis-

(a) The King v. Jukes, 8 Term Reports 542.

1850. sioners to issue warrants, not only for the ejectment of the parties convicted, but also to commit them to gaol; it enables them also to impose a fine, not exceeding £20. Under such an act it is clear that the utmost strictness should be observed in the framing of the summons and convictions, and that no conviction should be made except on the best and on conclusive evidence. The onus of proof is purely on the accuser, not on the accused. Here this witness calls the land in question part of a certain tract, &c., and says the whole of that tract has not been ceded. How do we know then, but that part of it has been ceded, and that the part ceded is the very land now in question? Were only one acre ceded, it should appear which it is; so that we may all see whether the part in question is or is not ceded, which is left quite undetermined by this evidence. Another defect in the conviction is, that it does not state what punishment is ordered by the commissioners. They are to impose a fine, and in the conviction they should state that they had done so, and its amount.

Argument.

There cannot be a conviction on the ground that the lands were never ceded; because, although no evidence was given of it, yet it is a well known historical fact that they have been ceded. They were ceded by the Mississagua Indians in 1792, and again by the Six Nations on the 18th day of January, 1841. True, this last was a surrender in trust for sale, but still a surrender, and sufficient to take the case out of 2 Vic., chap. 15. But, admitting that the settlers did not (not having the documents) prove their titles, there could be no proper conviction without evidence to support it. An accused party cannot be legally convicted, merely because he cannot prove his innocence.

It is said on the other side that this is not a penal statute. Now "a penal act is one whereby a forfeiture is inflicted for transgressing the provisions therein contained." This act creates a crime and inflicts various penalties. An act which does this must receive the very strictest construction in favour of the accused. (a) "No man incurs a penalty unless the act which subjects him to it is clearly both within

(a) Dwaris on Statutes, 642, 750; Looker v. Halcomb, 4 Bing., 183.

the spirit and the letter of the statute, imposing such penalty." 1850.

—Dwarris 763. The danger arising from the violation of those rules is, that then, as was said by Chief Justice *Best*, in *Fletcher v. Lord Sondes*: (a) "The fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws."

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The evidence of *Smith* is clearly insufficient, if for no other reason, because it is not such as, if false, would support an indictment for perjury. For that purpose the oath must be positive and absolute. If one only swears as he believes, thinks or remembers, he cannot be convicted of perjury, except in a case where he must have known that the fact was contrary to what he stated to be his belief; (b) and *Smith* is safe enough in that view, for he perhaps knew nothing about the matter, one way or the other. There is a failure then of proof of a material fact, and the accused must have the benefit of the doubt. (c) There is no precedent for prosecuting a man for trespass against the Crown, and convicting him merely because he cannot prove his own innocence. For these reasons, therefore, they submitted the conviction was bad, and should be quashed. Amongst the authorities cited, were—*Rex v. Lloyd*; (d) *The King v. Thompson*; (e) *The King v. Benwell*; (f) *The King v. Clarke*; (g) *The King v. Lammas*; (h) *The King v. Harris*. (i)

Argument.

Mr. *Wilson* and Mr. *L. W. Smith* for the Crown.—The second act only extends the jurisdiction, which the former one gives to the commissioners—it does not repeal it, and a conviction may be founded upon the first one alone. It need not negative the exceptions not contained in both acts.

It is quite clear that the parties were in possession. It is also evident enough that these are lands over which the statutes give the commissioners jurisdiction. This is sufficiently proved by *Smith*. If the appellant had any right, or relied upon any facts which were a sufficient answer to the complaint, he should have produced and

(a) 3 Bing. 580.

(c) Best on Ev. 92, 93, 99; 1 Stark. Ev. 500.

(d) Strange, 996.

(f) 6 T. R. 75.

(h) Skinner, 562.

(b) Hawk. P. C. 433.

(e) 2 T. R. 18.

(g) 8 T. R. 220.

(i) 7 T. R. 238.

1850. proved them before the commissioners. The commissioners are to find whether the party is a trespasser, and they state that they have so found. *Smith* proves, and we contend sufficiently, that the appellant has no title. If this evidence be untrue there was an opportunity to contradict it by other evidence; but it does not seem that this was attempted. It is alleged, that there have in fact been cessions and surrenders of these lands; but if so, why was not evidence of this given, so as to rebut the testimony of *Smith*? Under the evidence which was given, the commissioners have come to the only conclusion which they properly could arrive at.

The words in the conviction “for the cession of which to Her Majesty,” &c., are sufficiently within the meaning of the statute. It is not necessary in the convictions to use the precise words of the statutes; we find, that the lands are the lands of the Indians; that they are in the occupation of the Indians, and that no cession of them has been made. Of course, then, the Indians must be “claiming title” to the lands, but that need not be stated in so many words. If they are still Indian lands unceded, who can be claiming title to them properly but the Indians?

Argument.

The jurisdiction under these acts was intended to be summary, and it would be injurious to permit appeals on such grounds as are here advanced. The conviction is in fact regular enough; it states all that it is necessary to show that the power of the commissioners was properly exercised. The cases referred to were—*Tarry v. Newman*; (a) *The Queen v. Stock*; (b) *Lee v. Clarke*. (c)

The judgment of the court was delivered by—

THE CHANCELLOR.—This is one of several appeals from the decision of certain commissioners, appointed under a statute of the parliament of Upper Canada, passed in the 2nd year of Her Majesty’s reign. The grounds of appeal, stated in the petition, are very numerous; but upon the argument, the learned counsel for the appellant rested his case upon the following points: first, that the evidence is insufficient to support the “conviction,” (as the judg-

(a) 15 M. & W. 645; Stra. 1066. (b) 8 Ad. & E. 405. (c) 2 East. 338.

ment of the commissioners was termed throughout the argument.) Secondly, it was argued that the conviction is bad, for the following defects: first, because it does not negative the exceptions contained in the first section of the 12th Vic., ch. 9; secondly, because the allegation in the conviction is, that the entire tract named in the township of Tuscarora had not been ceded to Her Majesty, whereas it should have been; that the particular parcel on which the trespass is said to have been committed had not been ceded; thirdly, because the allegation is, that the tract had not been ceded to Her Majesty; whereas a cession to any of Her Majesty's predecessors should have been negated; fourthly, because it is not alleged that the Indian tribes claimed title to the land in question; and lastly, it was argued that the conviction is defective, in not having adjudged that the appellant should relinquish possession.

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As regards the evidence, I am of opinion that no case has been made requiring our interference. *Smith* was no doubt a competent witness. His evidence satisfied the commissioners. And I am of opinion that it is *prima facie* sufficient to warrant their judgment. So far as that evidence is affirmative, establishing the fact of trespass upon lands appropriated for the residence of Indian tribes, I am unable to perceive why the testimony of this witness should not be regarded as affording sufficient ground for the commissioners to proceed upon. So far as the evidence is of a negative character, the complainant must, from the nature of the thing, be permitted to proceed in the first instance upon a *prima facie* case. It is obvious that conclusive proof could not have been adduced of those negative allegations; and had all the officers of government been summoned to give evidence upon the hearing of the complaint, still the evidence would have been open to the same sort of objection as is made to the testimony of *Smith*. On the contrary, had the *prima facie* case, made by the complainant, been unfounded, it was open to the appellant to have established the affirmative by positive proof; but neither before the commissioners, nor in this court, has any such evidence been adduced. I am of opinion, therefore, that the

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1850. evidence below was sufficient to warrant the judgment; and that no case has been made in this court to justify us in disturbing it.

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But on proceeding to consider the other grounds of objection to this judgment, I must observe, that I cannot concur in the principle upon which this case has been argued. Throughout the discussion the judgment was treated as a conviction—properly so called; and the arguments used, and the cases cited, were such as would have been used and cited, had this been a proceeding to quash such conviction. But it is obvious that this judgment cannot be regarded in the same light as a conviction; and the petition of appeal is in no respect analogous to a proceeding to quash a conviction. The 11th section of the 2nd Victoria gives an appeal to this court, and empowers the Vice-Chancellor to “revise, alter, affirm, and annul the decision, and to make such orders as to costs and otherwise, as to him may seem meet.” The bare recital of the jurisdiction conferred upon us, is sufficient to establish the inapplicability of the decisions which were cited. Possibly the clearest refutation of many, if not all the arguments adduced, would be found in a careful perusal of the clause granting the appeal. One thing is apparent; that the legislature did not intend that the judgments of the commissioners should be annulled or reversed on merely technical grounds. We are authorised to alter and amend.

But considering the case in the light in which it was viewed upon the hearing of the petition, I am of opinion that the arguments addressed to us, were based upon an erroneous view of the statutes. It was contended in the first place, that the 12th Victoria, chapter 9, had repealed altogether the first section of the 2nd Victoria, ch. 15; inasmuch as the latter act, it was argued, repeals so much of the first clause of the former as restricts the powers of the commissioners to lands, for the cession of which to Her Majesty no agreement had been made; and it was argued that inasmuch as that clause is exclusively conversant about such lands, therefore the clause must be treated as entirely repealed. I do not feel the force of this argu-

ment. The former statute recites in the preamble the different circumstances under which the public lands had been subjected to trespasses of various kinds, and in regard to which it would be expedient to arm commissioners with summary jurisdiction. Of the lands thus enumerated, the first class consists of lands appropriated for the residence of certain Indian tribes; and this class is treated throughout as a distinct denomination. The enacting clause, however, after authorising the appointment of commissioners, and empowering them to enquire respecting trespasses to "any of the aforesaid lands," (not confining it to Indian lands,) adds this curious qualification—"for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto." It is not easy to conjecture the object with which such a qualification was introduced. It would seem in effect almost to nullify the statute. But it is quite obvious, that the qualification is by no means exclusively applicable to the first class of land (those appropriated for the residence of Indian tribes) as was argued, but affects equally all the denominations mentioned in the preamble. The 15th chapter of the 2nd Victoria, therefore, was not confined in its operation to "lands appropriated for the residence of Indians," in the sense in which those terms are used in the preamble, but extended to all unceded lands; and when the 12th Victoria, chapter 9, repealed so much of the former act, as limited the operation thereof to "lands, for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto," (using the very terms employed in the former act,) the effect of that provision was, to leave the former act applicable to all the lands enumerated in the preamble without qualification, and amongst the number, to lands appropriated for the residence of certain Indian tribes. If this be the proper construction of the acts, then upon the grounds on which the case was argued, and assuming the restrictions in the latter act to extend to all the denominations of land enumerated in the former, it would still seem that the exceptions in the latter act cannot have any *greater* effect than if they had

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1850. been contained in a subsequent clause of the former act; in which case it would not have been necessary to have negatived them even in a conviction. I am inclined to think, however, that upon the true construction of both acts the legislature must be intended to have meant the exceptions contained in the latter act to apply to those denominations of land only which are enumerated after the first class, (namely, the lands appropriated for the residence of Indians,) treating that class as sufficiently distinct, requiring no exception; as indeed it would seem to be. For land appropriated for the residence of Indians, cannot, while so appropriated, fall within any of the enumerated exceptions; the moment it becomes the subject of either grant, lease, or letter of license, it ceases to be land appropriated for the residence of Indians; the affirmation that it is land so appropriated, involves in it the negative of all the exceptions, and to negative them expressly would be useless tautology. If this construction be sound, all the objections must fail; because there is no exception to be negatived. but whether this be the true construction or not, it seems to me that the objections most relied on, as well as to the evidence as to the form of the judgment, cannot be sustained. If that portion of the former act which restricted the jurisdiction of the commissioners to lands for the cession of which no agreement had been made, has been repealed, then both the allegations and proof upon that subject were superfluous; the precise effect of the statements in the judgment in relation to that matter, whether sufficiently certain, or open to the objections taken to them, need not be determined; and the silence of the judgment as to the Indian tribes claiming title to the lands is immaterial.

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Upon this view the 2nd, 3rd, and 4th objections entirely fail; and the arguments as to the deficiency of the evidence lose much of their weight. But it was urged in the last place that the finding of the commissioners is defective, in not having adjudged that the appellant should relinquish possession within the time allowed by the law. Here, however, as in the other branches of the case, the learned

counsel seem to have been misled by the analogy supposed to exist between judgments under these acts and convictions. I remarked before, that no analogy exists, and if the observation were at all doubtful, this objection would furnish the strongest confirmation. For, however decisive the cases cited may be as regards convictions, they have clearly no bearing upon the question before us; and the express provisions of the statutes in question demonstrate that the objection is untenable. This judgment determines all that is required, namely, that the appellant was unlawfully in possession of land appropriated for the residence of Indians. The warrant of removal is in the nature of an execution upon this judgment; it may or may not be required according to circumstances; the power to issue such warrant, as well as the period at which it shall be issued, are left with the commissioners, only they are required in the first instance to issue a notice, as provided by the second section of the former act; all this is utterly inconsistent with the notion that the decision of the commissioners must adjudge the trespasser to relinquish possession within any definite period.

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Upon the whole I am of opinion that no case has been made requiring us either to vary, reverse, or annul the decision, and that the appeal must be dismissed with costs.

THE QUEEN V. JOHNSON.

This was also a case of appeal from the judgment of the commissioners appointed under the statute 2 Vic., ch. 15. The petition raised the same objections as are set forth in the last case, and came on for argument at the same time. **ESTEN, V. C.**, delivered the judgment of the court.

This is an appeal under the acts 2 Victoria, chapter 15, and 12 Victoria, chapter 9. The land in question is the north half of lot No. 6, in the 4th concession of the township of Oneida. An information was laid before the commissioners appointed under these acts, on the 17th November, 1849, by one *Peter Smith*, who is called an Indian interpreter; in pursuance of which the appellant

1850. was summoned to appear before the commissioners on the 11th of December then next ensuing, to answer to the charge made against him by such information, of illegally occupying the land in question, contrary to the provisions of the acts before mentioned. The appellant did not appear in compliance with such summons; whereupon at the time and place appointed, the commissioners proceeded to investigate the charge, and upon the evidence of one witness—namely, the before-named *Peter Smith*—found the appellant guilty, and issued a notice calling upon him to remove from the land in question within thirty days. From this judgment of the commissioners, the present appeal is brought; and after looking at all the authorities which were cited in the course of the argument, and which I have been able to find, and after due consideration of the arguments, which were urged with much force and ingenuity by the learned counsel for the appellant, I am of opinion that the judgment must be upheld. I shall first notice the objections made to the judgment by the petition of appeal, in the order in which they are there stated, and then proceed to advert to some other points which were raised in the course of the argument.

Judgment.

The first objection impeaches the evidence upon which the judgment was founded, as illegal and insufficient. The only witness examined by the commissioners was, as before mentioned, *Peter Smith*. I suppose that the evidence of one witness is sufficient for the purposes of these acts, if it appears credible and establishes all the facts necessary to warrant the judgment. Neither the competency nor the credit of this witness has been in any way impugned, and I am not aware of any ground upon which his evidence can be considered illegal. He proves that the appellant was not one (that is, a member) of any of the tribes of Indians occupying the land in question; that he had not, to the best of his belief, any title to occupy the land; that he saw him on the land on the 14th of November previous, when he admitted to him that he was in the possession of it; and that, to the best of his belief, he continued in the occupation of it from that time to the time of his examination. This

evidence, uncontradicted, is, I think, sufficient to prove the alleged trespass, supposing the lands to be of the description specified in the acts. Upon this point, his evidence is as follows, namely:—that the land in question was, as he believed, part of the parcel or tract of land mentioned in his information; that it was then appropriated to the residence of the Six Nations Indians; that such tract was in the occupation of those tribes; and that no agreement for the cession of the tract to her Majesty had, as he believed, been made with the tribes occupying it. The facts deposed to by this witness, of appropriation, occupation, and non-cession, were, I think, capable of being known to an individual. He swears to these facts to the best of his belief, and I think that such evidence, uncontradicted and unimpeached, was sufficient for the purpose for which it was adduced. The witness states that to the best of his belief the land in question was, at the time of giving his evidence, appropriated to the residence of these Indian tribes. If at this time he had been aware, or had any reason to believe, that any agreement for the cession of it had been made with her Majesty or any of her predecessors, which was in force and had been carried into effect, he would have been guilty of perjury in asserting upon his belief that it was then appropriated to the use of the Indians.

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The second objection asserts that the land in question has been actually ceded to the government by the Six Nations Indians a long time ago, and demands enquiry into that fact. Supposing such to have been the case, it appears nevertheless, that the tract in question is in the occupation of these tribes—and we must suppose with the knowledge and consent of the government, as the contrary is no where pretended, and the government cannot be ignorant of the fact of such occupation. If, then, this tract of land is in the occupation of the Six Nations Indians with the consent of the government, it is, I think, land appropriated for their residence, and not ceded within the meaning of the acts of parliament in question, which, in this respect, I agree with Mr. Wilson, are remedial, and must receive a liberal construction. The acts are intended to embrace all Crown

1850. lands whatsoever, whether in the occupation of Indians or not, provided, in the latter case, they are not under lease, purchase, location, or license of occupation. These lands, if in the occupation of the Indians with the consent of the government, are precisely the lands intended to be protected by these acts; the object of which would be in a great measure defeated if they were excluded from their operation. In short, it appears to me that if lands are in the occupation of the Indians with the consent of the government, they are not withdrawn from the operation of the acts in question by an old cession not apparently acted upon, and which for this purpose must be considered as abandoned or suspended. I think, therefore, that the enquiry which is asked for would be useless if made, and ought not to be directed.

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The third objection points to the exceptions specified in the act of 12 Victoria, chapter 9, and asserts that they ought to have been negatived by the conviction. These exceptions, however, apply to a totally different class of lands from the present, namely, lands not in the occupation of the Indian tribes. The acts in question were intended to embrace lands in the occupation of the Indian tribes, and lands not so occupied, or, in other words, all other Crown lands, provided they were vacant—that is to say, not under lease, purchase, location, or license of occupation. But these qualifications apply only to lands not occupied by the Indian tribes; and if it is shewn that lands are in the occupation of the Indian tribes, it is not necessary to negative the exceptions referred to, which have no application to them. These remarks dispose likewise of the fourth objection, which stands on the same ground with the third. Lands in the occupation of the Indian tribes by the permission of the government, cannot be intended to be under grant, lease, location, or license of occupation.

The fifth objection I pass for the present.

The sixth objection, which asserts that the 1st section of the 2nd Victoria, chapter 15, is repealed, is unfounded in fact. The 1st section of the 2nd Victoria, chapter 15, is not repealed, but extended. The restriction which limits its

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operation is repealed, and the clause itself includes not only the lands originally comprised in it, but other lands also. When the proceeding concerns lands in the occupation of the Indian tribes, it is strictly correct to found it upon the clause in question, which retains the same force that it ever had, and is only extended, not repealed, by the 12th Victoria, chapter 9.

With regard to the 7th objection, which impugns the judgment for founding itself on both acts, whereas it stands only upon one, it does not appear to be very material. The two acts constitute but one law; and if a proceeding which purports to be under both acts is sufficiently sustained by one, the reference to the other is mere surplusage, which does not vitiate.

The eighth objection suggests that the evidence of *Peter Smith*, who, as already mentioned, was the only witness examined in this matter, does not negative the cession of the particular piece of land in question, but only of the entire tract of which it forms a part. I take a different view of this evidence, which appears to me sufficiently to negative any cession of the land in question either to her Majesty or any of her predecessors, within the meaning of the acts.

Judgment.

With regard to the tenth objection, which insists that the judgment does not find that the lands in question are occupied by any tribe of Indians, or by any tribe of Indians claiming title to them, I think that the purport of the judgment in this respect is misapprehended. It appears to me that the commissioners adjudge that the land in question is in the occupation of the Six Nations Indians, under an appropriation to their use, and that they have or claim title to it under such appropriation. The objection, therefore, is without foundation.

The eleventh objection says that the judgment fixes no time for the commission of the offence to which it refers. It appears, however, that the commissioners determine that the appellant was, before the preferring of the information, the date of which appears, and thenceforward to the time of pronouncing the judgment, in the unlawful occupation of the

1850. land; and this, I think, is quite sufficient, and obviates all
 just objection on this ground.

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The twelfth and thirteenth objections impugn generally the sufficiency of the evidence and the regularity of the proceedings. I confess that for the reasons already detailed I think the evidence sufficient, and I have been unable to discover any material irregularity in the proceedings, and am therefore of opinion that these two last objections must be overruled also.

Judgment. The cases which have been cited establish that summary convictions under a statute must negative all exceptions, and every thing which, if true, would constitute a defence, and must be self-sufficient, or exhibit on their face enough to sustain them—must contain a precise adjudication or determination—must state the whole evidence on both sides, and not merely the conclusion from it—and must shew that it was given in the presence of the defendant, or that, being duly summoned, he neglected to attend—and must shew that the defendant was guilty of the offence respecting which jurisdiction is given. These rules are founded in reason and common sense, and probably apply to convictions or judgments under the acts in question; but I think that they have all been observed and complied with in this instance. For the illegal occupation of lands comprised in the acts, the commissioners are not authorised to inflict any punishment: they are simply empowered, by means of a notice, to order a removal, which has been done in the present case, in accordance with the provisions of the acts.

The fifth objection insists that the appellant actually has a license of occupation for the piece of land in question. I should be disposed, if he should desire it, upon affidavit of the fact, to direct an enquiry upon this point—at the peril, however, of costs, if he should fail in establishing the fact alleged; otherwise, I think this appeal should be dismissed, with costs.

CLEVELAND V. McDONALD.

1850.

Pleading—Parties—Trustee.

When a bill is filed against a trustee by parties claiming adversely to his *cestuis que trust*, without making them parties to the bill, it is the duty of the trustees to object that the owners of the estate are not before the court; where, therefore, a trustee, under such circumstances, neglected to make the objection, the cause was notwithstanding ordered to stand over, with leave to amend by adding parties—without costs.

Mr. *Eccles* and Mr. *Strong* for the plaintiff.

Mr. *Brock* and Mr. *R. Cooper* for the defendant.

The facts of the case bearing on the present decision are fully stated in the judgment of the court.

THE CHANCELLOR.—The transactions which have given rise to this suit have been conducted with strange irregularity. The pleadings are deficient in statement and the frame of the record imperfect; nevertheless the substantial justice of the case appears to me to be extremely plain. It appears that the plaintiff, being seised in fee simple of the premises in question in the cause, conveyed them to one *Luther Dyer*, in fee, by indenture of bargain and sale dated the 4th November, 1837. This conveyance was in form absolute, though in fact upon condition. *Dyer*, however, executed a cotemporaneous bond, which disclosed the true nature of the transaction. The plaintiff subsequently became indebted to the defendant, a solicitor of this court, in the sum of £12 10s. or £15, (for it is differently stated,) and being pressed for payment, assigned to him *Dyer's* bond. This instrument is also in form absolute, and is expressed to be in consideration of £200; but it was in truth conditional only for securing the debt of the defendant, as also the debts of some other parties.

Judgment.

This assignment was executed on the 6th October, 1838, and the defendant agreed to re-convey to the plaintiff, upon certain terms specified in the condition of a bond contemporaneously executed. The defendant, having either compromised with *Dyer*, or paid his demand in full, obtained from him a conveyance in fee simple of the premises in the cause, and thereupon brought an action of ejectment, and obtained possession some time in the course of the year 1840. Thus far the statements on either side sufficiently

1850. agree. Perhaps it may be said that no discrepancy exists which would give rise to any question other than one of account. But from this point the facts are represented in a widely different light. It is alleged on the one side that the defendant, finding the property falling into a state of dilapidation, applied to the plaintiff to put them in proper repair and to become the occupant at a stated rent. That this proposition was agreed to by the plaintiff, upon condition that he should be permitted to continue such occupation until the incumbrances on the estate should have been liquidated by means of the stipulated monthly payment, or otherwise discharged. That the plaintiff had at all times been ready to come to an account with the defendant, and pay him whatever should be found due upon the security ; but that the defendant had refused, asserting that his title was absolute, and that the plaintiff had no right to redeem. The bill charges, as evidence of the plaintiff's right of redemption, that the defendant had on several occasions admitted it in conversation ; and at one time offered him, plaintiff, £100 if he would execute a release. The plaintiff claims the benefit of such compromises as the defendant may have effected with his creditors ; alleges that the rents and profits already received by the plaintiff are sufficient to pay off incumbrances, and asks an account and redemption.

Judgment.

The defendant, on the other hand, asserts that the plaintiff, finding himself unable to pay off the incumbrances on the mortgaged property, and being willing to release his equity of redemption in consideration of being discharged from the various debts intended to be secured by the assignment, made a proposal to that effect, which was accepted by the plaintiff ; and that thereupon the defendant's bond was delivered up to be cancelled, and the plaintiff was let into possession simply as his tenant. He asserts that the various proposals charged in the plaintiff's bill, and amongst them the offer of £100, were made for the purpose of buying peace ; he suggests whether, under the circumstances, the plaintiff has any right to redeem, and submits to such account as the court may direct.

Now, although the instruments prepared for the purpose

of carrying out the intentions of these parties as admitted by both sides, are extremely inartificial, and open to the observations so repeatedly made in relation to transactions of this sort, as being calculated to lead to the unfortunate difficulties and litigation which have arisen in this cause; and although the allegations in the pleadings are singularly defective in relation to the persons most materially interested in this trust, (the creditors of the plaintiff,) being in fact almost silent as to the course pursued by them originally in relation to this contract, and the steps taken by them since its execution; yet I am of opinion that sufficient is to be found upon the record to warrant a decree, but for the defect to which I shall presently advert. The assignment is alleged to have been made as a security merely for certain debts. This is distinctly admitted by the answer. And it appears sufficiently, I think, that this assignment was made at the instance of the creditors, or, at all events, that they subsequently approved of it. This transaction, therefore, amounts to a mortgage in fee of the plaintiff's equity of redemption in the premises in question, to the defendant, to secure a sum of money in part due to himself, and as to the residue due to certain creditors, for whom he was trustee; and a reference would have been matter of course, but that the answer alleges that the plaintiff subsequently released his equity of redemption.

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Now, without entering into any enquiry whether the facts set up by the answer (namely, the parol agreement and consequent cancellation of the bond) would, as a matter of law, amount to a release of the plaintiff's equity of redemption, which it is unnecessary to consider, I must confess that I not only have not been able to discover a single tittle of evidence to sustain the case made by the answer, but that there is very much to be found in the proofs directly opposed to it.

The defendant is represented as acting under a sense of the necessity of proceeding cautiously in his dealings with the plaintiff, subsequent to the recovery in ejectment, in consequence of the trouble he had already occasioned. Now, without any peculiar caution, there are two steps

1850. which one would have expected from a professional gentleman in carrying out the arrangement which the answer represents to have been made in 1842, one necessary for the security of the defendant and his *cestuis que trustent*, the other for the security of the plaintiff. One would have expected to find, on the one hand, the plaintiff's equity of redemption in this estate released by a formal instrument, and on the other hand, the claim of the various creditors upon the plaintiff, determined in like manner. But we do not hear that such instruments were either executed or even contemplated. Then it is not shewn that this trustee either paid the *cestuis que trustent*, or that he ever apprised them of the arrangement into which he had entered. On the contrary, the representative of Dr. *Converse* not only appears never to have been paid, but to have been left in ignorance of the provision made for his debt. And although Mr. *Sanderson* survived the alleged settlement for several years, no definite arrangement is shewn to have been made relative to his debt. Again, the plaintiff is represented as having been admitted into possession in 1842, simply as tenant, having given up his bond for cancellation, convinced that the estate would not suffice to meet the incumbrances. Yet Mr. *Brundage*, who was present upon that occasion, swears that the plaintiff was asked to produce the bond, for the purpose of enabling the defendant to compute the amount still due. Lastly, it is difficult to reconcile the offers of compromise in 1845, with the absolute release of all interest in 1842. Of course a proposal made for the purpose of purchasing peace ought not to prejudice the defendant's case. But I must repeat that I have not been able to find any thing in the facts or circumstances of the case by which to reconcile the admitted fact (the offer of £100 in 1845 to compromise the claim) with the alleged fact of the fair and final relinquishment of the right, in 1842, as worthless. These observations were not necessary for the purpose of determining whether the defence ought or ought not to prevail; because, as I have said, there is no evidence to support the case made by the answer. But they have an important bearing on the subject of costs, and have

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led my mind to the conclusion that, were the record in such a state as to enable us now to pronounce a decree, it would be proper to permit the plaintiff to redeem without costs.

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But I am of opinion that, upon the record as at present framed, we cannot pronounce any decree; and that the cause must stand over, with liberty to the plaintiff to amend by adding the necessary parties. This is a conveyance to a trustee for the benefit of creditors. We remarked, in the case of *Houlding v. Poole*, (a) that the passage to be found in Lord *Redesdale's* book, which represents that "trustees of real estate, for payment of debts or legacies, may sustain a suit either as plaintiff or defendant, without bringing before the court the creditors or legatees for whom they are trustees," has been decided not to be in accordance with the practice of the court, therefore the *cestuis que trustent* are necessary parties, and must be added, unless the parties will arrange the matter out of court.

The defendant would not be entitled to the costs of the day, upon the principle which it has seemed to us expedient to adopt in cases of this kind, without reference to the particular circumstances of the case, inasmuch as he neglected to take the objection by his answer. But there is an additional reason here, because it was the defendant's duty, as trustee, to have taken care that his *cestuis que trustent* were made parties in a suit like the present. Trustees are not themselves owners of the property; they are in a sense agents for the owners in executing the trusts, but they are not constituted agents for the purpose of defending the owners against adverse claims of parties in this court. It is the duty of trustees in such a situation to object that the owners of the estate are not before the court. (b) The cause must therefore stand over, with liberty to the plaintiff to amend by adding parties, without costs.

Judgment.

JAMESON, V. C., concurred.

ESTEN, V. C.—The bill alleges and the answer admits the mortgage to *Dyer*, also the mortgage to the defendant; differing only as to the amount secured by the latter, and which ought to be made the subject of enquiry; the pay-

(a) Ante 206.

(b) *Holland v. Baker*, 3 Hare, 72.

1850. ment of *Dyer's* claim; and the assignment of his mortgage
 {
 Cleveland to the defendant, whereby the latter held the premises, to
 v. secure what he had paid to *Dyer* and to the other creditors
 McDonald. of the plaintiff; the dispossession of the plaintiff by the
 defendant, and his retention of the possession, whereby he
 became accountable for the rents. As I have already stated
 these facts are sufficiently admitted on the pleadings.

The evidence which has been taken relates chiefly to admissions of the plaintiff's title to redeem; the state of the premises; the satisfaction of debts due by the plaintiff, and whether made by the defendant or by the plaintiff; and conversations in which the defendant, though he does not deny, still does not expressly admit the plaintiff's title.

Judgment. From the best consideration that I have been able to give the case, I am of opinion that the plaintiff is entitled to file a bill to redeem; and the defendant must account for the rents and profits. The debts due by the plaintiff to *Donaldson*, *Nugent* and *Ferris*, appear to have been paid by the defendant. If that be the case, then the defendant will be entitled to charge the amounts on the security in his hands; and they, therefore, are not necessary parties.

The defendant is also entitled to charge *Dyer's* debt on the security.

The debt due to *Dr. Converse* appears never to have been paid; and as it is stated that he assented to the arrangement which was entered into between the plaintiff and defendant, his personal representative would seem to be a necessary party.

A reference should be made to the master to enquire and state what amounts were intended to be secured by the mortgage to the defendant, also what sums were actually paid by him to *Dyer* and others; what amounts remain due, and to whom; and also to take an account of what is due to the defendant, and an account of the rents.

With regard to the claim set up and submitted to the court by the defendant, I do not think there is any thing in the admissions proved, although subsequent to the transaction, which should preclude the defendant from raising the question and submitting it to the judgment of the court, as

he has done ; and if the answer is to be believed on the subject of costs, he may nevertheless be entitled to his costs. 1850.

The defendant may read his answer upon the point of costs ; and I see no reason to doubt its truth. It is not falsified by *Brundage's* evidence, who does not prove that the bond was delivered ; and in the interval between the conversation which he relates and the delivery of the bond, the original understanding might have been reverted to.*

It is not unnatural that the defendant should have been satisfied with the surrender of the bond, having the conveyance in fee from *Dyer* ; nor is it surprising that nothing more should have been given to the plaintiff. Business is frequently done carelessly in this country. The expressions which the defendant used from time to time, denoting doubt whether the release of the equity of redemption was effectual, are, I think, very natural. Having this title, such as it was, and doubting whether it was valid or not, it is not surprising that he should have occasionally made promises and offers, as stated by *Brundage* and *Hannah Warden*, which, however, were before the surrender of the bond, and the original agreement may afterwards have been reverted to. Judgment.

The plaintiff never was in a situation to redeem, and

* That part of the evidence of Theophilus Brundage, a witness called on the part of the plaintiff, which is referred to in the judgment of the court, was the following:—

“ I was present in the office of the defendant when the complainant and defendant had a conversation relative to the premises in question ; I think in 1842. The complainant was then about to go into possession of the premises from which he had been ejected by the defendant, who held a deed in fee simple from Luther Dyer for the same. There was some talk between the parties at the time about selling the premises ; the defendant told complainant to go and repair the house and have it put in as good a state as possible, and that he would sell the place ; and all it would fetch over and above what was due by complainant to the defendant, the complainant would get. Complainant then asked defendant how much was due to him ; defendant replied that he could not tell the amount, unless he saw the complainant's bond, which complainant said he would go and get for him. Defendant said if he would do so, as soon as he made out from it what the amount referred to was, he (defendant) would return it to the complainant. The complainant upon this went off, for the purpose, as I understood, of getting the bond to give to defendant. * * * I understood that the bond spoken of was one given by the defendant to the complainant, for the conveyance of the property in question ; I cannot say whether or not the complainant *did* procure the bond ; I know that I advised him strongly to do so, and was informed shortly after by complainant that he did so.”

The evidence of *Hannah Warden*, corroborated the statement of *Brundage*, so far as it relates to the promise of defendant to pay the plaintiff such amount as the property sold for, over and above the debt due the defendant.

1850. redemption was never actually obstructed by the defendant insisting upon this title. In such case the result might have been different. But I see nothing to prevent the defendant from setting up this title, and taking the opinion of the court upon it, as he has done; nor do I see that he should not receive his costs. All the costs, however, may be reserved.

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In the course of the enquiries which I have mentioned, it will appear who are the necessary parties, and they can be added as the necessity for having them before the court becomes apparent. I think this arrangement preferable to that of adjourning the cause generally, for the purpose of adding parties.

THRASHER V. CONNOLLY.

Practice—Amendment.

An amendment of a bill by adding parties, requiring no answer from the defendant, is a waiver of process of contempt for want of answer; and in such a case the court will, on an *ex parte* motion, order the defendant's discharge.

Mr. *Strong* moved, *ex parte* on the messenger's return of *cepi corpus*, for an order for the committal of the defendant Connolly to the gaol of the county of Hastings, or for a writ of *habeas corpus*, or such other process as the court might consider the plaintiff entitled to.

Statement. It appeared that after the defendant was in contempt for want of answer, the plaintiff had amended his bill by adding parties, not requiring any further answer from the defendant.

Mr. *Mowat* moved *ex parte* for the discharge of the defendant without costs, on the ground that the contempt had been waived by the amendment.

The motions came on together; and Mr. *Strong* cited *Taylor v. Wrench*. (a) He contended that an amendment by adding parties requiring no further answer, was not such an amendment as waived a contempt for want of answer; that the case cited shewed that such an amendment did not waive exceptions for insufficiency, while any other amendment did, and was therefore an authority for the present motion.

Mr. *Mowat*, contra, cited *Symonds v. Duchess of Cumberland*; (b) *Gray v. Campbell*; (c) *Ball v. Etches*. (d) The case of *Livingstone v. Cooke* (e) was also referred to.

(a) 9 Ves. 315. (b) 2 Cox, 411. (c) 1 R. & M. 323. (d) 1 R. & M. 324.
(e) 9 Sim. 468.

Judgment for the defendant on both motions: the court considering the amendment a waiver of the contempt. 1850.

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v.
Connolly.

ANONYMOUS.

Practice—Costs.

When after notice of motion, under the 33rd order [of May, 1850,] is served, and before the motion day the answer is filed, the plaintiff is entitled to his costs of the motion.

The time for answering having expired, the plaintiff gave notice of motion, under the 33rd order, to take the bill *pro confesso*. Before the day on which this motion was made the defendant filed his answer.

Mr. *Mowat* now moved agreeably to his notice, and the question was, whether he was entitled to his costs.

Mr. *Turner*, for defendant, contra.

THE CHANCELLOR.—In case of a notice to dismiss, and the filing of a replication before the motion comes on, the defendant may move and obtain his costs of the motion. This, we consider, as a clear analogy in favour of the present application. Judgment

CARNEY V. BOULTON.

Practice—Amendment.

Where the plaintiff's solicitor absconded before the time to amend the bill as of course had expired, and his departure was not known to the plaintiff till afterwards, and due diligence appeared to have been used by the plaintiff to proceed with the cause, after becoming acquainted with such departure, the court granted leave to amend on payment of costs.

The plaintiff moved to discharge her solicitor, and for her papers to be delivered up to her new solicitor, without prejudice to the lien of the solicitor; and also for leave to amend her bill.

To support this application several affidavits were filed, from which it appeared, amongst other matters, that her solicitor was one *George Cole*; that the respective answers of the defendants had been served on the 16th and 17th of February; that no further proceedings had taken place in the cause; that on the 3rd of April *Cole* absconded from the province to avoid his creditors, having taken some steps in the meantime with the view of proceeding in the cause;

1850. that the plaintiff first heard on the 12th of April of *Cole's* departure; and the delay which had occurred subsequently was accounted for in the affidavits by minute details of what had taken place afterwards. The affidavits also embodied the requirements of the 9th and 11th of Mr. V. C. *Jameson's* orders as to the materiality of the amendments, and their having been duly settled. And the bill, with the intended amendments, was produced in court.

Mr. *Mowat* for the motion.

Mr. *Crickmore* for *W. H. Boulton* opposed the motion for leave to amend.

Mr. *Morphy*, for the other defendants, submitted to the leave being granted on payment of his client's costs of the application.

No one appeared for Mr. *Cole*, though notice had been given of the motion, by serving one of his former clerks.

Judgment. THE CHANCELLOR.—This was an application for leave to amend, and to change a solicitor. We think both applications should be granted. The circumstances are very peculiar; and it appears to us that the plaintiff has exerted reasonable diligence, and must be considered as applying for leave to amend on the 9th of April, the time for making such application not in fact expiring until the 14th. With respect to the other point, Mr. *Cole* must be considered as having discharged himself in this case, and, under such circumstances, it is perfectly clear that the client may not only appoint a new solicitor, without paying the costs of the old one, but may have all papers delivered up by the old solicitor to the new one, upon his undertaking to hold them subject to the lien of the old solicitor, and to restore them undefaced within a limited time after the hearing. This rule respects all papers in the case; a different one probably applies to original documents, which, however, under such circumstances, the old solicitor would be compelled to produce for the purposes of the suit. (a)

The plaintiff must pay the costs of this motion so far as it regards the change of solicitor, and must pay the costs of

(a) *Mayne v. Hawkey*, 3 Swans. 93.

the defendants *Harris*, *Wakefield* and *Murray*, but not of 1850.
the defendant *Boulton*.

Carney
v.
Boulton.

CHISHOLM V. SHELDON.

Practice—Adding parties.

Where a cause stood over at the hearing, with leave to add parties, and to exhibit an interrogatory to prove the will of the testator, and the plaintiffs afterwards amended by making the devisees of the testator co-plaintiffs, and in addition to the interrogatory to prove the will, exhibited interrogatories to prove the fact of the persons so added as co-plaintiffs being the parties named in the will; a motion made to expunge those interrogatories as being unwarranted by the order to amend, was refused with costs.

The order drawn up, giving the plaintiffs leave to amend, was as follows:—"That this cause do stand adjourned over, and the plaintiffs are to be at liberty to amend their bill of complaint by adding proper parties as plaintiffs or defendants, as they may be advised, or to shew why they cannot bring the proper parties before the court; and it is ordered, that the plaintiffs be at liberty to exhibit an interrogatory to prove the will of the testator, *William Chisholm*." Statement.

The plaintiffs having amended their bill under this order, by adding the devisees named in the will of *Wm. Chisholm* as co-plaintiffs, exhibited an interrogatory to prove the will, and two others, which were to the following effect:—"Was *Rebecca Chisholm*, one of the complainants, &c., the wife of *William Chisholm*, &c.; and do you know whether *George William Chisholm*, &c., (naming the several children of the testator), are, or are any or either of them, and which of them, child or children of the said *William Chisholm*? &c.

The third interrogatory required the witnesses to state which of the said children are or is of the full age of twenty-one years—whether the said *William Chisholm* and *Rebecca Chisholm* had any other child or children than those named in the cause, and whether dead or alive; if dead, to state when he, she, or they died; also, which of the females were married and to whom, and which of them attained the age of eighteen years; also, whether *William Chisholm* was ever married to any other person than the said *Rebecca Chisholm*.

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These were objected to by the defendants as being unauthorised by the order, and a motion was now made by Mr. *Turner* to expunge them on that ground.

Mr. *Brough* contra.

Judgment.

THE CHANCELLOR.—We discharged a motion to have the amendments made in the bill in this case taken off the file, (a) upon the principle that where liberty is given at the hearing of a cause to amend by adding parties, such an order warrants the introduction into the record of such allegations, if any, as may be necessary to connect the new parties with the case stated. (b) The interrogatories exhibited by the plaintiff, which the defendant now asks to have taken off the file, are founded upon those amendments; and he asks to have them taken off the file, as unwarranted by the order made at the hearing. It seems to me that this motion has been made under some misapprehension. It is true that the order made at the hearing reserved to the plaintiff the right to exhibit an interrogatory to prove the will of the testator *Chisholm*; and it is equally plain that the interrogatories complained of would not be sanctioned by that part of the order. But they are obviously exhibited, not in virtue of the leave expressly reserved, but under the general practice for the purpose of establishing the allegations introduced into the bill by amendment. This is therefore in effect a motion to have these interrogatories taken off the file as impertinent. It would seem very questionable whether it is competent to the defendant to make such a motion, or if competent, whether the motion in question has been made at the proper time and place. Mr. *Daniel*, in his *Chancery Practice*, says, (c) “Interrogatories, like all other proceedings in the court, may be the subject of a reference for scandal. It seems, however, that they cannot be referred for impertinence alone. And the case cited by Mr. *Daniel* (d) seems to be in point. Assuming, however, that a reference for impertinence alone would be sanctioned by the practice of the court, I find no authority

(a) Ante 294.

(b) *Watts v. Hyde*, 2 Phil. 406; *Stephens v. Frost*, 2 Y. & C. 297; *Wood v. Wood*, 4 Y. & C. C. C. 135.

(c) Vol. 2, p. 469.

(d) *White v. Fussell*, 19 Ves. 113.

to warrant the course here pursued by the defendant, in making this motion at this time. But without determining these points, it seems to me that these interrogatories are not impertinent or unwarranted. If it be true that an order made at the hearing to amend by adding parties, necessarily implies the right of adding such allegations as may be necessary to connect the new parties with the case stated, or to shew why they need not or cannot be made parties, then it seems to me to follow that the plaintiffs must be at liberty to adduce such evidence as may be required to prove those allegations. The order to amend would otherwise be obviously illusory. (a)

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ESTEN, V. C.—The suit appeared to be defective for want of the presence of the devisees named in the will of *William Chisholm*, either as plaintiffs or defendants—plaintiffs, if the will were acknowledged—defendants, if the will were disputed. The order gave leave to add these persons as parties, either plaintiffs or defendants. If they should be made plaintiffs, it would become necessary to prove the will; if defendants, not. The order, therefore, went on to give the plaintiffs liberty to prove the will, meaning in the event of the then plaintiffs acknowledging the will, and making the co-devisees parties plaintiffs, then that in that case that all the plaintiffs should be entitled to prove the will. But the object of the order was to enable the plaintiffs to prove their title to maintain the suit, which consisted, not merely in the will itself, but in their being the persons intended by it as devisees. In short, the order meant that the plaintiffs should prove the devise under which they claimed; for which purpose they must prove, not merely the will, but their own identity. This is the entire scope of the interrogatories, which have been objected to. It was not perhaps necessary to identify the widow or the former plaintiffs because they were named in the will, nor to prove which of the children attained twenty-one or eighteen respectively; but in this respect the interrogatories being intended, not to introduce evidence of any fact not author-

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(a) *Willats v. Busby*, 3 Beav. 420.

1850. ised to be proved, but merely the more fully to prove the facts authorised to be proved, no objection can be sustained on this ground. The interrogatories, I think, are regular, and this motion must be refused, and with costs, it being a clear case.

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PRENTISS V. BRENNAN.

Practice—Injunction—Contempt.

Where, by the injunction issued in a cause, the defendant, his agents, &c., were restrained “from preventing the plaintiff, his counsel, &c., from having, and from in any way interfering with their having, free access at all times to the books and papers of the said co-partnership, and each and every of them; and from removing such books and papers, or either of them, from the usual place of business of the said co-partnership; and from retaining or keeping, or suffering to be retained or kept, any of the said books or papers, in any other place than the place of business of the said co-partnership, until, &c.,” and upon the plaintiff, who had been a partner of the defendant, applying to the brother and clerk of the defendant for access to the said books, and which had usually been kept locked up in a desk in the place of business of the co-partnership—where such application was made—such clerk answered to the effect, either that he had “instructions not to suffer,” or that he had “not instructions to suffer,” the plaintiff to see the books; when at the same time he was aware that the books and papers had been removed from their accustomed place to the private residence of the defendant by the defendant, assisted by his said clerk, and subsequently removed by the defendant to Toronto: *Held*, that the clerk was guilty of a contempt of this court, and was ordered to pay the costs of the motion to commit.

In this case an injunction had been issued (see ante p. 371) enjoining the defendant from “preventing the plaintiff, his counsel, attorneys and agents, from having, and from in any way interfering with their having, free access at all times to the books and papers of the said co-partnership, and each and every of them; and from removing such books and papers, or either of them, from the usual place of business of the said co-partnership; and from *retaining* or *keeping*, or suffering to be retained or kept, any of the said books or papers in any other place than the usual place of business of the said co-partnership, until this court shall make other order to the contrary.” It appeared from the affidavits filed, that the defendant had been made acquainted, as early as the 6th of June, with the fact of the injunction having been directed to issue, and had actually been served with a copy on the 8th. It further appeared that when the officer went to the premises of the defendant on the 6th of June, the defendant had gone to Toronto, and service of the injunction was made on *David R. Brennan*, the brother of the

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defendant, who was acting in the capacity of clerk in the store or place of business of the co-partnership; and a demand was made for access to the books and papers, which was again made on the 10th of June. On both occasions the clerk returned for answer that he had "instructions from his brother *not to allow* the plaintiff access to the books," or words to that effect, according to the affidavits filed by the plaintiff, and according to the affidavit of *David Brennan* himself, that he had "*not instructions* to allow the plaintiff access," &c. It was shewn that he was aware on both occasions that the books and papers asked for by the plaintiff, had actually been taken by the defendant to Toronto, for the purpose, as the defendant said, of preparing his answer.

The plaintiff having afterwards ascertained that the books had been taken away by the defendant in the manner stated, and that he still continued to keep them away from the usual place of business of the co-partnership, a motion was now made to commit the defendant for breach of the injunction, and to commit the clerk of the defendant for contempt, in aiding and assisting in such breach.

Mr. *Mowat*, for the motion.—The defendant is clearly shewn so have committed a breach of the injunction, and the brother had been aiding and assisting the defendant to commit the breach of the injunction complained of. The removal of the books and papers to Toronto, although made before the granting of the injunction, had evidently been made for the purpose of preventing the injunction being complied with for a time; and although the clerk had not been guilty of any *direct* breach of the injunction after he had notice of it, still the false impression conveyed to the plaintiff by the answer made, was a sufficient aiding and assisting in the committing of a breach of the injunction, to entitle the plaintiff to move as against him. As respects the defendant himself, no doubt could exist that he was clearly liable to committal. If, however, the court should entertain any doubt of the grounds shewn being sufficient to warrant the committal of *D. R. Brennan*, none, he submitted, could arise of their being amply sufficient to justify

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1850. the court in visiting him with the costs of the motion.—
 Lord Wellesley v. Earl of Mornington. (a)

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Mr. Vankoughnet and Mr. Turner contra.—Would not attempt to justify the conduct of the defendant in withholding the books and papers in the manner he is stated to have done. As respects *D. R. Brennan*, however, it must be borne in mind, that he was acting in the capacity of clerk to the defendant. And they submitted that as such he was not bound to answer any questions of the plaintiff, or any other person. He would have been wrong in *doing* any act to prevent the plaintiff from obtaining free access to the books and papers, but he was not bound to be *active in assisting* him to obtain such access. They contended, also, that the application should have been made against the defendant and his clerk by two separate motions.

Judgment. THE CHANCELLOR.—The general features of this case were pointed out in our judgment upon the motion for the injunction, and need not now be recapitulated. The particular facts, upon which this motion to commit the defendant and his agent *David Robert Brennan* depend, are simple, and, at least, so far as the defendant is concerned, uncontradicted. The subpoena to appear and answer was served upon the 30th of May, and at the same time, by permission of the court, notice of the motion for an injunction. The defendant proceeded almost immediately to Toronto, for the purpose of instructing his solicitor as to his defence, but seems to have returned with little delay to Kingston, having instructed his solicitor to apply for the postponement of the injunction motion. On the 4th of June, the day fixed for the motion, the learned counsel for the defendant having declined to enter into any undertaking on behalf of his client, the hearing of the motion was postponed; but an injunction was ordered in the meantime, which was upon the same day served upon the solicitor for the defendant. The writ reached Kingston on the 5th, and the officers of the sheriff having failed in their efforts to serve the defendant, he embarked on the afternoon of that day for Toronto, carrying with him all the books and papers of the co-partnership. He arrived at Toronto on the 6th, and the

service of the injunction was effected on the 8th. The injunction had been served upon *D. R. Brennan* upon the 6th, at Kingston, and access to the books had been demanded and refused; and upon the 8th the solicitor for the plaintiff gave notice to the solicitor for the defendant, that it was his purpose to move that the defendant, or his agent, should be committed, for such breach of the injunction. He at the same time informed him, however, that the threatened motion would not be made, provided the defendant would then permit the plaintiff to have access to the books and papers of the co-partnership. At the time of this communication the plaintiff had not been apprised that the books had been removed to Toronto, neither was any information then afforded him on the subject, but he remained in ignorance of this fact, till apprised of it by the defendant's affidavit on the 17th June. Access to the books was a second time demanded of the defendant's agent, at the usual place of business at Kingston. The agent of the defendant again refused to comply, either upon the ground that the defendant had so instructed him, or that he had no instructions from the plaintiff on the subject, (the matter is differently stated,) and he refused the plaintiff access to the usual place of deposit. The writ had not been complied with at the time this motion was heard.

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Brennan.

Judgment.

I find no reason to doubt that the defendant, in pursuing the course of conduct I have just detailed, was guilty not only of a gross and intentional violation of his duty towards his co-partner, but also of a manifest breach of the process of this court. Authority is not wanting for the position, that the removal of the books from Kingston on the 5th, after service of the injunction upon the defendant's solicitor on the 4th, would in itself have been such a breach of the injunction, under all the circumstances of the case, as would have warranted this motion. (a) The defendant left Toronto, instructing his solicitor to apply for the postponement of the motion for an injunction; the injunction is granted notwithstanding on the 4th; that fact might have been communicated

(a) *Lewes v. Morgan*, 5 Price 518; *Sedgewick v. Redman*, cited *Drewry on Injunction*, page 400.

1850. to the defendant without difficulty the same day; service of the writ cannot be effected upon the 5th; upon the evening of that day all the books of the firm are removed, without any reasonable cause, and when here, instead of having been placed at the disposal of the plaintiff, as would have been the case, had the defendant meant to have acted fairly by his partner, or in compliance with the process of this court, the books are still withheld, and every thing relating to them is carefully concealed. This evidence tends very strongly to the conclusion that the defendant had notice of the injunction on the 5th of June, and removed the books in defiance of the writ; but I prefer to proceed upon the subsequent acts, which appear to me free from question.

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Judgment.

It is to be assumed, I think, that the defendant had notice of this injunction on the 6th of June, the day of his arrival at this city. It was served upon him personally on the 8th. The writ restrained "the defendant from preventing the plaintiff, his counsel, attorneys or agents from having, and from in any way interfering with their having, free access at all times to the books and papers of the co-partnership, and from removing such books and papers, or any or either of them, from the usual place of business of the said co-partnership, and from retaining or keeping, or suffering to be retained or kept, any of the said books or papers, in any other place than the usual place of business." It is to be assumed, I think, that the defendant had notice of this writ on the 6th of June, the day of his arrival here. It was served upon him personally upon the 8th; but during the interval between the 6th and 12th, the plaintiff has been prevented from having access to these books, by the act of the plaintiff in retaining them away from the proper place of deposit; and during the same period the defendant has, in open defiance of the writ, suffered the books to be kept away from the usual place of business of the co-partnership. The admitted facts seem to me to preclude any doubts upon the subject. I can discover no ground upon which it can be said that the defendant has not been guilty of a breach of the injunction.

With respect to *David Robert Brennan*, although his own

affidavit places his conduct in a most unfavourable light, and although it is almost impossible to escape from the conclusion that he acted in concert with the defendant, for the purpose of defeating the process of this court, yet as the motion to commit is in the nature of a criminal proceeding, it seems to me safer under all the circumstances of the case, that no order for his committal should be pronounced, but that he should be ordered to pay such of the costs of this application as have been occasioned by his conduct.

JAMESON, V. C., concurred.

ESTEN, V. C.—In this case I think the defendant has been guilty of a clear breach of the injunction. He must have been acquainted with the order of the 4th of June on the 6th; he knew the full extent of its exigency, for the injunction, directed by it, was to be in the terms of the notice of motion, which was in the possession of his solicitor; he was served with the order and injunction on the 8th, and yet, on the 17th, the books and papers to which they relate were in Toronto, and notice of this motion was given on the 12th—Judgment. six days after he became acquainted with the order, and four days after service of it, and of the injunction, which required him forthwith to restore the books and papers in question to their proper place of deposit in the counting-house or shop of the partnership. The order, therefore, must be made against the defendant, with costs.

The case is also clear, I think, against the clerk and brother of the defendant, *D. R. Brennan*. On the 6th of June, when he was served with the injunction, and a demand was made of access to the books and papers mentioned in it, and again on the 10th of June, when that demand was repeated, he made an answer to the application, which was untrue, and calculated to mislead, which, therefore, it must be inferred, was made for the purpose of misleading, and could have been made with no other object than to defeat or delay the injunction. Such conduct is no doubt a contempt of the court. If it could be supposed that when he returned this answer on the 6th, he was taken by surprise and did not know how to act, the same excuse would not apply to the same answer returned on the 10th, when he had had four

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1850. days for consideration. But I think that the same character of deliberation applies to his conduct on the 6th. It appears from his own affidavit that the subpoena and notice of motion for the injunction were served on the defendant on the 30th May. On the same day the defendant proceeded to Toronto to advise with his counsel, and returned to Kingston on the 1st of June. On the 3rd he removed the books and papers in question to his private residence, his clerk and brother being the agent he employed for that purpose; and on the 5th these books and papers are conveyed to Toronto. I do not think it is too strong a presumption to make, that when the defendant removed the books and papers to Toronto, as it must have been within his contemplation that an injunction might issue, and a demand of access be made during his absence, it was arranged and concocted between him and his clerk, that should such be the case, the answer should be returned which was in fact made. As, however, it is possible, that *D. R. Brennan* might not have supposed he was committing any contempt of this court in acting as he did, I think it may answer the ends of justice to make him pay the costs of this application.

Judgment.

SAME CAUSE.

Practice—77th order.

Under the 77th order of May, 1850, the court will decree a reference, without prejudice to an injunction previously obtained.

The plaintiff having obtained the injunction as above stated, a motion was made by

Mr. *Mowat* on behalf of the plaintiff, under the 77th order of May, 1850, for a decree to take the partnership accounts, and that the decree should be without prejudice to the injunction.

Mr. *Turner*, contra.

The decree was made as asked.

BECKETT V. REES.

Practice—Replication nunc pro tunc.

Where the plaintiff had proceeded in the cause as if a replication had been filed, and no motion was made by the defendant to have the mistake rectified—the court, after service of the rule to produce and notice of examination of witnesses, allowed a replication to be filed *nunc pro tunc*, on payment of costs.

Mr. *R. Cooper* moved upon affidavit to be allowed to

file a replication *nunc pro tunc*, and cited 1 *Smith*, C. P. 1850. 337; *Mosely*, 196; as authorities to warrant the present application.

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Rees.

Mr. *Gwynne*, contra.—If even the motion were granted, the cause would not be at issue. The dry-dock company, a defendant in the cause, did not appear, and the plaintiff proceeded under the 75th of the old orders, and entered an appearance for the company. This, he submitted, the plaintiff was not at liberty to do, as he contended that the order referred to did not apply to corporations.

THE CHANCELLOR.—It appears by the affidavits upon this application to have a replication filed *nunc pro tunc*, that a replication was prepared and taken to the registrar's office for the purpose of being filed upon the 23rd of March. This occurrence happens to have been attended with particular circumstances, which leave no room to doubt the correctness of the statement. The difficulty one feels is, in concluding that the solicitor for the plaintiff has not done all that was incumbent on him. A copy of the replication was served upon the defendant's solicitor on the same day, and a rule to produce, and notice to examine witnesses, were served respectively on the 23rd of March and the 22nd of May. During all this time both parties seem to have been under the impression that every thing was regular. No motion was made by the defendant to have the omission rectified, notwithstanding the various steps taken by the plaintiff—under such circumstances it is, we think, reasonable, and in accordance with the practice, that the plaintiff should have the leave he asks. Mr. *Smith* says, (a) where by mistake a replication had not been filed, and yet witnesses had been examined, the court permitted the replication to be filed *nunc pro tunc*. That statement is a literal extract from Lord *Redesdale's* book on pleading. (b) It is borne out by the authority referred to, (c) and seems to us sufficient to support the plaintiff's application.

Judgment.

Leave granted on payment of costs.

(a) *Smith* 337. (b) *Mit.* pl. 323, 4 Ed. (c) *Rodney v. Ward*, *Mos.* 196.

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WARREN V. MCKENZIE.

Mortgagee—Assignee.

Where the administratrix having bought at sheriff's sale the interest of the mortgagor, paid off the mortgage debt, and, treating the property as her own absolute estate, afterwards mortgaged the premises; the court at the instance of the heir-at-law of the mortgagor, directed an enquiry as to whether the property was purchased at sheriff's sale with the assets of his ancestor, and that the amount so applied should be deducted from the amount due upon the mortgage given by his ancestor, and that he should be let in to redeem upon payment of the balance.

Mr. *Morphy* for the plaintiff.

Mr. *Vankoughnet* for the defendants.

Judgment. THE CHANCELLOR.—The bill in this cause asks that the plaintiff may be permitted to redeem the mortgage premises in the pleadings mentioned, discharged of certain incumbrances created by the defendant *Charlotte McKenzie*, under the following circumstances: on the 15th of February, 1821, *John Warren*, the plaintiff's father, conveyed the premises in question to Messrs. *Richardson, Forsyth and Company*, in fee simple, by way of mortgage, to secure the sum of £1602 7s. 4d. then due to those gentlemen. This debt was payable according to the proviso for redemption, in three equal instalments, the last of which fell due on the 24th of April, 1824; but *John Warren* failed to fulfil his contract; and at the time of his death, in September, 1832, a sum of about £400 remained still due on the foot of this security. He died intestate, leaving *Charlotte Warren*, now *Charlotte McKenzie*, his widow, and the plaintiff, his heir-at-law, him surviving. On the 1st of June, 1833, *Charlotte McKenzie* procured the administration of the estate of her deceased husband to be committed to her by the proper court, and also entered into possession of the mortgage premises, or of some part thereof. In her answer, the personal estate is represented to have been insufficient to pay the debts of the intestate; and she says that having exhausted all the assets, *Thomas Street*, a judgment creditor to the extent of about £200, whose writ against goods had been returned *nulla bona*, sued out a writ against lands, and in the month of June, 1834, placed the same in the hands of the proper sheriff, who in virtue thereof offered for sale the intestate's interest in the mortgage premises. *Charlotte McKenzie* further represents that being desirous

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to become the proprietor of the property she applied to her brother *Robert Stanton*, to act as her agent in the matter, who accordingly did attend the sale on her behalf, and was declared the purchaser at the sum of £700. This was not a sale of the equity of redemption subject to incumbrances, but it was the intention that the balance due upon the mortgage of 1821 should be discharged out of the purchase money, and accordingly *Robert Stanton*, at the request of *Charlotte McKenzie*, applied the balance, after payment of *Street's* judgment, to that purpose. In the meantime *Forsyth's* partners having died, and the premises in question having become vested in *Forsyth* as surviving mortgagee, by indenture of the 4th of March, 1836, and made between *Forsyth* and *Stanton*, the security was assigned to *Stanton*. This instrument recites a debt of £2000 as due, and purports to have been made in consideration of that sum, but it is admitted that the amount really due was about £500. On the 9th of February, 1837, the sheriff of the Niagara district by deed poll of that date, purported to convey all the intestate's interest in the mortgage premises to *Stanton*, in pursuance of the sale under *Street's* judgment; and upon the 28th of April, in the same year, *Stanton* conveys to *Charlotte McKenzie* in fee.

Judgment.

It is admitted by all parties that *Stanton* acted in this transaction merely as the agent and trustee of *Charlotte McKenzie*, and she represents the proceedings as a fair attempt on her part to purchase the property, in a mode at that time ordinarily practised. The bill, on the other hand, asserts the personal estate of the intestate to have been amply sufficient to meet all demands, and the plaintiff claims that the payment to *Forsyth* should be regarded as made on his behalf, in pursuance of his right to have the estate disencumbered by the personal representative of his father; a relief to which he would obviously be entitled under the circumstances he has stated.

Subsequently to the conveyance from *Stanton*, *Charlotte Warren* intermarried with the defendant *Kenneth McKenzie*, and they, treating the premises in question as their absolute property, by two several indentures, dated respectively the

1850. 5th of June, 1841, and the 15th of March, 1842, affect to convey them by way of mortgage to the other defendants, *Taylor and Campbell*, to secure certain sums then advanced to *Kenneth McKenzie*, or already due from him. It is admitted that these parties had perfect knowledge of the state of the title at the date of their respective securities.

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All the defendants insist by their answers, that under the various conveyances to which I have referred, *Charlotte McKenzie* acquired an absolute title in the mortgage premises. Failing that defence, they submit that they are entitled to the equitable consideration of the court, and that under the particular circumstances of this case redemption should not be decreed; neither of these points was much insisted upon at the hearing, but it was argued that *Charlotte McKenzie* having paid *Forsyth* the balance due upon the mortgage of 1821, with her own proper moneys—the derivative mortgagees are entitled to the benefit of their securities to that extent, irrespective of the state of the account between the administratrix and the estate of the intestate. And it was further urged, that an account of rents and profits should be directed only from such time as the plaintiff should prove a demand of possession.

Judgment.

We are of opinion that none of these considerations affect the plaintiff's right. With regard to those presented by the answers, the subject was lately under our consideration in the case of *Chisholm v. Sheldon*; (a) and, not to repeat what was there stated, we think, that under the decisions which have been had, the sheriff's sale must be treated by us as inoperative; and we are unable to discover any thing in the particular circumstances of the case which could warrant us in depriving the plaintiff of his equity of redemption under the statute.

As to the manner in which the account is to be taken, it is, we apprehend, quite clear, that where an assignment of a mortgage is taken without communication with the mortgagor, the assignee takes subject not only to the then state of the account between the mortgagor and mortgagee, but also subject to all such changes as may take place before

the mortgagor has notice of the assignment. (a) It follows accessorially that, in this case, these derivative mortgagees take, subject to the account between *Charlotte McKenzie* and the estate of *William Warren*. If indeed the estate have been duly administered, as is alleged, then *Charlotte McKenzie*, had she made no assignment, would now be entitled to hold this estate as a security for whatever sum was due to *Forsyth* at the date of the transfer, less the sum since repaid by rents and profits. But on the other hand, if the moneys of the estate have not been duly applied, this assignment would be but a security for the balance of the amount in the hands of the administratrix, and her assignees can now stand in no better position.

1850.

Warren
v.
McKenzie.

MEYERS v. ROBERTSON.

Practice—Changing solicitor.

This court will order a party's solicitor to be changed without any condition as to paying the solicitor his costs.

Mr. *Turner*, for the plaintiff, moved to change his solicitor.

Mr. *Morphy*, for the solicitor, offered no opposition to the order asked for being granted—he submitted, however, that the order should be drawn up directing the change to be made upon payment of the costs due the present solicitor.

This condition is invariably contained in orders to change the name of a party's attorney-at-law, and he submitted that no good reason existed for any different practice being pursued in this court.

THE CHANCELLOR.—In the courts of common law, here as well as in England, the order is always made upon that condition; but the practice has not been adopted by the courts of equity. In Ireland, indeed, something of the kind seems to have formerly existed; but when the subject was brought under the notice of Lord *Redesdale* he declined to act upon the precedents cited to him; (b) and his lordship determined the point, not upon the distinction between clerks in courts and solicitors, but upon the broad ground, that a solicitor having a lien upon papers in his hands for

Judgment.

(a) *Matthews v. Walwyn*, 4 Ves. 118. (b) *Odea v. Odea*, 1 S. & L. 315

1850. his bill of costs, is already in a more advantageous position than ordinary individuals, and does not require the additional security claimed for him. Courts of equity in England have declined to stay proceedings in a suit until the plaintiff should have paid his former solicitor, upon a similar principle. (a) For obvious reasons, those cases are not directly in point, but they furnish a strong analogy ; and, irrespective of authority, we think an unconditional order more in accordance with principle, and better calculated to promote the general interests as well of solicitors as suitors.

Meyers
v.
Robertson.

McINTOSH v. ELLIOTT.

Where a testator devised his estate (real and personal) upon trust, amongst other things, for the support, &c., of his children, until they should attain the age of twenty-one or marry, and so soon as the youngest attained the age of twenty-one years or married, then to convey, &c., the said estate in equal proportions to the children, with a devise over to his brothers and sisters in the event of the death of all his children under the age of twenty-one years and unmarried ; a petition presented by the widow and infant children of the testator, praying for a sale of a portion of the corpus of the personal estate, for the purpose of maintaining the family and keeping the houses in repair, was refused with costs.

Argument. Mr. *Turner*, on behalf of the widow and infant children of the testator in the pleadings named, presented a petition stating, amongst other things, that the widow had expended large sums of money, and had contracted debts to a considerable amount in and about the repairs of the houses devised by the testator ; that she was unable to pay such debts, or to provide the children with sufficient and proper maintenance and education ; and praying that part of the personal estate might be sold, and the proceeds applied to these objects.

Mr. *Mowat*, for the devisees over, opposed the granting of the prayer of this petition, on the ground that the will contained a devise over after the death of the widow, and also of the testator's children under the age of twenty-one years and unmarried ; and the general principle is, that the court, under such circumstances, will not grant a petition such as the present. He referred to *McPherson on Infants*, 225, and the cases there cited.

(a) *Merrewether v. Mellish*, 13 Ves. 161 ; *Twort v. Dayrell*, 13 Ves. 195 ; *Maynes v. Watts*, 3 Swan 93.

Mr. *Turner* cited *Locker v. Bradley*, (a) *Bell v. Dunmore*, 1850.
 (b) *Rickabe v. Garwood*, (c) *Butterworth v. Harvey*, (d) as
 authorities for the present application.

McIntosh
 v.
 Elliott.

On the 27th of September the application was refused.

THE CHANCELLOR.—The petition presented in this cause on behalf of the widow and infant children of *Robert McIntosh* deceased, represents that the rents and profits of the real and personal estate of the testator are insufficient for the maintenance of his family, and prays that a portion of the *corpus* of the personal estate of the testator may be applied, as well for the purpose of supplying an adequate fund for the maintenance of the family, as in keeping the houses, which constitute the principal part of the real estate, in repair.

The testator devised his estate real and personal to trustees upon trust, “to pay the annual and other interest moneys and rents received by them to *Mary McIntosh*, during her widowhood, to be applied by her towards the maintenance and education of his children living at the time of his death or born thereafter. * * * And upon this further trust, that upon the death or marriage of *Mary McIntosh*, his said executors, their heirs or executors should pay and apply the interest moneys and rents, thereinbefore mentioned, towards the support, maintenance and education of his said children, until they should respectively attain the age of twenty-one years or be married, and if at the time of the death or marriage of *Mary McIntosh*, any of his said children should be of the full age of twenty-one years or married, and if not, then so soon thereafter as any of them should arrive at that age or be married, then upon trust that his said executors, their heirs or assigns, should pay each of his said children so arriving at the age of twenty-one years, or being married, one equal proportional part, according to the number of children then living, of the interest moneys and rents as aforesaid, (always continuing to apply the remainder of the said rents and interest moneys towards the support of the unmarried children,) and upon this further trust, that so soon as all the surviving children should be married, or so soon as the youngest unmarried child should have arrived

Judgment.

(a) 5 Beav. 593. (b) 7 Beav. 286. (c) 8 Beav. 579. (d) 9 Beav. 132.

1850.

McIntosh
v.
Elliott.

at the age of twenty-one years, then his said executors should convey to each of the said children who should have arrived at the age of twenty-one years or have married, or in case of the death of any of them after arriving at that age or being married, then to his or her heirs, or to such person as he or she should appoint, &c., an equal proportional part of the real and personal estate bequeathed to his said executors." In case of the death of all the children under the age of twenty-one and unmarried, the whole estate is devised over.

Judgment.

It is plain that these children, who are all still infants and unmarried, take contingent interests under this will. (a) And inasmuch as the whole estate is devised over to the brothers and sisters of the testator, who take nothing in common with his children, upon a contingency which may still happen, it is clear that we cannot order any portion of the *corpus* of the estate to be disposed of in the way contemplated by these petitioners. Where the devise has been to a class, with a right of survivorship, the court has gone beyond, even against the provisions of the will in regard to maintenance. In such cases, however, the court has before it all the parties entitled, and the order compensates, or is supposed to compensate, those having the contingent interest upon survivorship. But to make such an order in the present case, would be to hand over to these petitioners property which has, in certain events, been devised to others—would be to convert into an absolute vested interest that which is contingent—would be in effect to make a new will for the testator. (b)

JAMESON, V. C., concurred.

ESTEN, V. C.—This was an application for increased maintenance, under a will which disposed of the whole real and personal estate of the testator to his widow during her widowhood, for the maintenance and education of the children; to whom upon her death or second marriage, the annual produce was given until they should all attain the age of twenty-one or marry; and upon that event, the *corpus* of the estate was to be conveyed in equal shares to such of them as should be alive, and the heirs, next of kin,

or appointees of such of them as should then be dead, having attained the age of twenty-one or married; and if they should all die under twenty-one and unmarried, the property was given to the brothers and sisters of the testator. The children are all under twenty-one and unmarried, so that the ulterior gift may yet take effect. The object of this application is to procure part of the principal or *corpus* of the estate to be applied to the payment of certain debts, incurred by the widow in the maintenance of herself and the children. Such a procedure could be justified only on the principle that the gift to the brothers and sisters was not of the entire *corpus* of the estate, but only of so much of it as might not be required for the maintenance of the children, inasmuch as it cannot be supposed that the testator did not intend his children to be fully maintained; I am not aware that this rule has ever led to the application of interest under such circumstances, much less principal; and I do not think that we should be warranted, in the absence of authority, in extending it that length, even in a case which called much more imperatively for such an interposition on the part of the court than the present; which does not appear to me to be one in which the court would exercise this power if it had it. This application must, I think, be refused with costs.

1850.

McIntosh
v.
Elliott.

Judgment.

STRONG V. LEWIS.

Vendor's lien for unpaid purchase money.

Where the purchase money of an estate was left unpaid, and a creditor of the purchaser (without notice) sued out an execution against lands, under which the premises in question were sold to the defendant, who had notice, the vendor's lien on the property for the unpaid purchase money was held to attach in the hands of the purchaser at sheriff's sale.

And Quare—Whether, if even the purchase at sheriff's sale had been completed without notice, the conveyance by the sheriff would not have conveyed the property subject to all existing equities against the debtor.

The bill filed in this cause stated, that one *LeBreton*, had conveyed certain lands in Nepean to one *Keefer* in fee, without having received payment of the purchase money or any part thereof; that a creditor of *Keefer* had obtained a judgment against him, which was duly registered, and had sued out a writ of execution thereon against his lands, under

1850. which the premises in question were sold at sheriff's sale to the defendant, who, by reason of such conveyance, claimed to hold the lands discharged of any lien of the plaintiff, who was the executor of *LeBreton*, for the amount of money left due on the lands. The creditor of *Keefer* had not notice, (but it was admitted that the defendant had,) of the claim of the plaintiff. The prayer was, that the plaintiff might be declared to have a lien on the said lands for the amount of the purchase money, and a sale of a sufficient portion to pay the amount due.

Strong
v.
Lewis.

To this bill the defendant filed a demurrer for want of equity.

Mr. *Turner*, for the demurrer, contended that the plaintiff at law, at whose suit the land had been sold, having had no notice of the claim of the plaintiff, and having taken the precaution of registering his judgment according to the provisions of the statute, was entitled to be looked upon as a purchaser for valuable consideration without notice; the defendant having had notice was not material, as the party at whose instance the sale was made had not had notice.

Argument.

Mr. *Strong*, contra, cited *Langton v. Horton*, (a) *Whitworth v. Gaugain*, (b) and submitted that the sale by the sheriff could only have conveyed such interest as *Keefer* had in the premises—that is, the fee, subject to the equitable charge of the plaintiff.

THE CHANCELLOR.—The only point argued before us upon this demurrer was, whether this court will enforce the vendor's lien for unpaid purchase money, against a purchaser at sheriff's sale, who at the time of his purchase had notice of the plaintiff's equity, although the creditor of the vendee, at the time his judgment was entered up and registered, was admitted to have had no notice of its existence.

Upon the argument of the demurrer, it was contended that the equity set up by the bill is of doubtful expediency, and therefore not entitled to the favourable consideration of the court. Secondly, that a purchaser who has entered up and registered his judgment, is to be treated as a purchaser for value, under 9th Victoria, c. 36, and to be protected from

all equities of which he may not have had notice. Lastly, 1850.
that such is, at all events, the position of a purchaser at
sheriff's sale.

Strong
v.
Lewis.

Where a conveyance has been executed prematurely, this court recognises an interest as still remaining in the vendor, for the purpose of securing the unpaid purchase money. That doctrine proceeds upon this, that it would be unconscientious in a vendee to hold the estate without paying the stipulated consideration. When, therefore, the entire purchase money is unpaid, the vendee is treated, in this court, as a trustee for the vendor; and where it remains in part unpaid, he is treated as a trustee *pro tanto*. Now, so far from considering this doctrine as of doubtful expediency, I quite concur in the opinion expressed by Lord *Camden*, and adopted by Lord *Loughborough*, that it is a natural equity, having its foundation in the oldest and best established principles of the court. (a) I know of no reason upon which it should be regarded with disfavour; but though such were shewn to exist, yet, so long as it remains a doctrine of this court, the plaintiff is entitled to its benefit.

Judgment

Then as to the effect of the judgment: before the statute 9 Vic., ch. 34, a judgment creditor could not have been regarded as a purchaser; and, in this respect, that statute made no alteration. Indeed, prior to the recent act 13 & 14 Vic., ch. 63, (which does not affect this case, and upon the construction of which we pronounce no opinion,) a judgment creditor had not even a lien, in the proper sense of that term. Had his judgment created a lien in his favour in the strict sense, it would have been competent for him to have filed a bill to give that lien effect; but no such course was open to him. His judgment, indeed, enabled him, by virtue of the statutes in that respect, to take certain steps for the realization of his debt from the estate of his debtors; and, because of that position, his security was taken notice of, and rendered effectual in this court under various circumstances; (b) but his position has always been distin-

(a) *Blackburn v. Gregson*, 1 B. C. C. 424. (b) *Neate v. Duke of Marlborough*, 3 M. & C. 407.

1850. tinguished from that of a purchaser. The judgment creditor has something in the nature of a lien upon the whole estate of his debtor, which he may enforce against any particular portion at his election. A purchaser, on the other hand, advances his money upon, and acquires a present interest in, the specific portion which forms the subject of his contract. Such being the true nature of the lien, which this court raises in favour of the vendor for the unpaid purchase money, and of the right acquired by the judgment creditor on the estate of his debtor; upon what principle can we refuse to protect the plaintiff's equitable interest from the judgment recovered against the vendee, who acquired the legal estate under a premature conveyance? Not only in the case of ordinary trusts, but when the trusts are constructive, implied by this court, equity protects the interest of the *cestui qui trust* from judgments recovered against the trustee. (a) Judgment recovered against a vendor is not permitted to affect the interest of a vendee, who has prematurely paid his purchase money, and for whom, therefore in the view of this court, the vendor is a mere trustee. Why should the equitable interest of the vendor, who may have executed a conveyance before payment of the purchase money, and for whom, therefore, the vendee is a trustee, be less regarded? Such a decision would proceed upon a purely arbitrary distinction, having no principle of reason for its justification. (b)

Judgment.

It is argued, however, that this defendant, as purchaser at sheriff's sale, must hold discharged of the plaintiff's equity. But, without determining whether such would be the effect, under any circumstances, of a sheriff's deed, which purports to convey only the interest of the debtor, without deciding whether such a conveyance (even where the purchase has been completed without notice) would convey the estate discharged of existing equities, or subject to them—a question of considerable magnitude and importance—(c) the purchaser in this case is, we think, clearly subject to the vendor's lien, of which he is admitted to have had notice. The judgment, we have seen, binds only that

(a) *Newlands v. Paynter*, 4 M. & C. 408. (b) *Whitworth v. Gaugain*, 3 Hare, 416; and in Appeal, 1 Phillips, 728. (c) *Langton v. Horton*, 1 Hare, 549.

in which the debtor has a beneficial interest, namely, the land subject to existing equities. The defendant, therefore, so far as he claims under the judgment, is in no better position than the creditor; he has no interest except in the balance which may remain after payment of the unpaid purchase money. So far as he claims under the sheriff's sale, he can, at all events, stand in no better position than an ordinary purchaser for value; and then, having notice of the plaintiff's lien, he of course takes subject to it. The demurrer must, therefore, be disallowed with costs.

1850.

Strong
v.
Lewis.

WALKER V. THE CITY OF TORONTO.

Pleading.

Where plaintiffs amended their bill, stating facts which, to a certain extent, made a new case, a demurrer by the defendants to the amendments, on the ground that such amendments were uncertain, contradictory, &c., and had rendered the case made by *the bill* vague and uncertain, was overruled by the court with costs, as being a demurrer to part of the bill only, and as relying on a ground appearing from the whole bill.

This was a bill filed by *James Walker* and his sureties to set aside a contract entered into by *Walker* with the corporation of Toronto, for the purpose of renting the fees of the market in that city. In the original bill it was stated, that the sum of £926 16s. 8d. included fees and rents of butchers' stalls; and it was alleged as the sole ground for setting aside the contract, that certain fees directed to be levied were illegal. The amended bill sought relief, because the £926 16s. 8d. (as was said) included both illegal fees and the rents of the butchers' stalls, although it had been represented to *Walker*, when offering to lease the fees, that that sum was composed of fees only, and not of those rents. The defendants answered the original bill, and, the amendments before mentioned having been made, demurred to the amended bill, on the ground that the amendments were uncertain, contradictory in themselves, and otherwise loose, &c., rendering the bill vague and uncertain.

Statement.

Mr. *Crickmore*, in support of the demurrer, cited amongst other cases *Cressy v. Beavan*, (a) *East India Co. v. Henchman*. (b)

Mr. *Vankoughnet* and Mr. *Turner* contra.

THE CHANCELLOR—We think this demurrer cannot be

1850. sustained on the grounds upon which it is rested. The demurrer is confined to the amendments, and should consequently rest on a ground appearing from those amendments. The amendments are partly separable from the original bill, partly dovetailed with it. The original bill relied solely on the illegality of the fees, admitting that the £926 16s. 8d. included both fees and rents. The amended bill impeaches the contract because the £926 16s. 8d. included both illegal fees and rents, asserting that it was represented not to include rents. To this extent the amended bill makes a new case, and was separable from the original bill; and if the defendants had demurred to such part of the amended bill, as claimed to set aside the sale because the £926 16s. 8d. was represented to comprise only fees, whereas it included also rents, the demurrer might have been good in point of form, and might have been allowed, if the facts should have appeared sufficient to warrant it. But this demurrer is to a very different effect. It is, that the amendments are uncertain, contradictory in themselves, and otherwise loose, prolix, embarrassing, and improper to have been made in the bill, and have rendered the case intended to be made by the bill (that is the whole bill) vague and uncertain; and that the case now intended to be made by the amended bill (that is, the whole bill) is in fact vague, uncertain and indistinct. Now, we are of opinion that the amendments, coupled with the part of the original bill which is retained, do not deserve the characters attributed to them by the demurrer; nor do they render the case stated in the bill vague, uncertain or indistinct. A demurrer for uncertainty, however, is considered as a demurrer for want of equity; and supposing, therefore, this demurrer to mean that the amendments are uncertain in themselves, and render the whole bill so uncertain that it states no case of equity upon which the court can act, I think that the demurrer is not only unfounded in fact, but that it is bad, because, being a demurrer to part of the bill only, it relies on a ground appearing from the whole bill. We think, therefore, that this demurrer should be overruled with costs. None of the cases cited have any material bearing.

Walker
v.
Toronto.

Judgment.

Demurrer overruled with costs.

1850.

MEYERS V. HARRISON.

Practice—Mortgagor—Sale.

Where a second mortgage does not notice the first, and contains absolute covenants for title, but there is no allegation in the pleadings, and no other evidence than the mortgage itself thus affords, that the mortgagor did not inform such second mortgagee of the first mortgage before the execution of the second, the court will not assume such to be the case, so as to vest the equity of redemption in such second mortgagee, under the statute of 4 and 5 William and Mary, ch. 16, sec. 3.

A mortgagee is entitled to a decree for a sale or foreclosure at his option, as against the mortgagor.

Mr. *Turner*, for the plaintiff, relied upon the case of *Emmons v. Crooks*, (a) and the authorities there cited.

Mr. *Mowat*, contra, cited *Keat v. Allen*, (b) stat 3 and 4 Wm. III., ch. 16; *Doe dem Rawlings v. Walker*; (c) *Phelps v. Prothero*; (d) *Fulham v. McCarthy*; (e) *Ramsbottom v. Gosden*; (f) *Gordon v. Hertford*; (g) *Wood v. Downes*; (h) *Story's Eq. Jur.*, secs. 115 and 162.

The facts of the case, and the arguments of counsel, are set forth in the judgment of the court, which was delivered by

THE CHANCELLOR.—The object of this suit is to have the property in question in the cause, to which the plaintiff makes title as equitable mortgagee in fee, sold, and the proceeds applied in liquidation of his mortgage debt. It appears that by an indenture, dated and executed the 7th of August, 1837, between *Smith Bartlett* of the one part, and *John Row* of the other part, this property was conveyed to *John Row* in fee simple, by way of mortgage, to secure £275. This deed does not contain any covenant to pay the mortgage debt, but by bond of the same date *Bartlett* bound himself in the usual way. This debt remaining unpaid, and being overdue, the security was, on the 2nd of June, 1842, assigned to *Hypolite Perrault*; and on the 7th of April, 1843, was again assigned to *John Paterson*. On the 7th of May next following the last assignment, it was agreed between *Paterson* and *Bartlett*, that the latter should release his equity of redemption in the mortgage premises, in consideration of the former delivering up for cancellation

Judgment.

(a) Ante, 159. (b) 2 Ver. 588. (c) 5 B. & C., 120. (d) 12 Jurist, 733.
(e) 12 Jurist, 760. (f) 1 V. & B., 168. (g) 2 Madd., 106. (h) 18 Ves., 133.

1850.

Meyers
v.
Harrison.

the bond which accompanied the mortgage ; and thereupon, by indenture of that date, *Bartlett* released his equity of redemption, nominally in consideration of £25, but in reality as a discharge of his debt. Up to this period, *Bartlett* had continued in possession of the mortgage premises, but upon the execution of the instrument last mentioned, possession was delivered to *Paterson*. At sometime between the execution of the release of the equity of redemption, and the 3rd of February, 1844, (the precise date is not ascertained,) *Hypolite Perrault* contracted to purchase the premises in question from *John Paterson* for £300. The consideration appears to have been fully paid at or about the time of the contract, but before any conveyance had been executed *Perrault* re-sold the premises to *Harrison*, the defendant in this suit, for £300 ; and thereupon, by indenture dated the 3rd day of February, 1844, between *Paterson* of the one part, and *Harrison* of the other, *Paterson*, by direction of *Perrault*, conveyed the premises to *Harrison* in fee simple, who was then let into possession. I shall have to observe hereafter upon the circumstances connected with the payment of *Harrison's* purchase money ; but it may be remarked here, that it was not paid upon the execution of the above conveyance.

Judgment.

In the meantime *Smith Bartlett* had, upon the first of February, 1841, conveyed the premises in question, with various other properties, to Messrs. *Bell* and *Forsyth* in fee, by way of mortgage, to secure a large sum then due, as well as future advances ; and default having been made, this security was assigned to the plaintiff by Messrs. *Bell & Forsyth*, on the 3rd of December, 1844.

It is contended that the plaintiff is not entitled to the relief he asks, because this estate is not subject to the incumbrance which the plaintiff seeks to enforce in the hands of *Harrison*, he being a *bona fide* purchaser for value, without notice ; or, if subject at all, then only so subject after payment of what remains due upon the mortgage to *Row*, which was, and still continues, the elder incumbrance. Failing those points, it is further contended, that the plaintiff is not entitled to a decree : first—because

he only prays a sale, while the court has no jurisdiction to order a sale of this estate under existing circumstances. Secondly, because this court will not give effect to the title under which the plaintiff claims, the purchase having been made by an attorney from his own client, at an under-value. Thirdly, because Messrs. *Bell* and *Forsyth*, or the plaintiff, who was at the time of the sale to *Paterson* their agent, sanctioned and encouraged that sale, and therefore cannot now be permitted to claim adversely to the purchaser. Fourthly—because Messrs. *Bell & Forsyth* should have been parties to this suit. And lastly—because it appears that Messrs. *Bell & Forsyth*, under whom the plaintiff claims, had no interest in the mortgage property at the time of the transfer.

1850.

Meyers
v.
Harrison.

As to the first objection: I am of opinion that the evidence fails to establish that the defendant is a *bona fide* purchaser for value without notice. That *Harrison* was a *bona fide* purchaser does not seem to be denied; and I find nothing in the evidence leading to the conclusion that he had notice of the plaintiff's incumbrance at the time of the execution of his conveyance. But several circumstances must concur in order to the validity of this defence, and amongst them, is this important particular, that a purchaser, seeking to avail himself of such a defence, must shew the entire purchase money to have been paid before he received notice of the incumbrance he wished to avoid. Sir *Edward Sugden*, in his masterly exposition of the law of vendors and purchasers, states the rule thus: (a) "The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deeds and payment of the purchase money, for till then the transaction is not complete; and therefore, if the purchaser have notice previous to that time he will be bound by it:" and again, (b) "A notice before actual payment of all the money, although it is secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract." And the numerous authorities collected by the learned author, fully estab-

Judgment.

(a) 2 Sug. Vend. and Pur. 306 (9th Ed.) (b) Ib. 274.

1850. lish his propositions. Now, in this case, the evidence distinctly proves that the defendant had not paid the whole of his purchase money before he had notice of the plaintiff's claim. A large part of the consideration was secured by the promissory notes of the purchaser, payable at distant dates. But the evidence also shews that of the residue, a very large portion remained due at the time notice was given. Indeed the defendant admits the fact in his answer, in such a way as to preclude all question, and therefore establishes conclusively the invalidity of this defence.

Judgment. It is next contended that the plaintiff can have no claim to have his debt discharged out of this estate, until after payment of such sum as may remain due upon *Row's* mortgage, which certainly was, and, as it is contended, still is the prior security, and must of course be first paid. The plaintiff, on the other hand, insists that his mortgage is in truth the first and only incumbrance upon this estate, inasmuch as the release of the equity of redemption by *Bartlett* had the effect of merging the first mortgage in the inheritance, thus leaving the subsequent security the only subsisting one affecting the property. The defendant meets this argument by saying that, at the time of the release by *Bartlett*, *Paterson* had no notice of the mesne mortgage; and he argues that, under such circumstances, no merger will have ensued; and he cites *Commercial Bank v. Street*. (a) He contends further, that, even though the court should be of opinion that *Paterson* had notice, we ought, notwithstanding, to hold that the original mortgage is still a subsisting security, inasmuch as the effect of an opposite conclusion would be altogether to destroy the defendant's interest in the property, which is confessedly insufficient to meet the plaintiff's demand. A further argument was deduced from the statute of William & Mary, to which I shall advert presently.

Had *Paterson* purchased the equity of redemption, without notice of the plaintiff's claim, as has been urged, the result would have been, that *Harrison* would have held the estate altogether discharged from that incumbrance. As a

(a) Ante, 169.

purchaser for value without notice, *Patterson* would have had equal equity with the plaintiff, and having besides the legal estate, this court would have taken no steps against him; notice to *Harrison* would in that case have been immaterial. But it is too plain to admit of doubt that *Paterson* had distinct notice of the subsequent mortgage at the time he purchased the equity of redemption. *Perrault* in his answer to the fourth interrogatory says, "before the agreement between said *Paterson* and said *Bartlett* last alluded to, I did in conversation with *Paterson*, state to him, that I had heard that Messrs. *Forsyth & Bell* had a mortgage from said *Bartlett* upon said premises;" and he goes on to add, that he at the same time informed *Paterson* that he had offered his mortgage to *Forsyth & Bell*, who had declined to purchase; a fact of considerable importance, because it shews that the notice to *Paterson* must have been sufficiently explicit. *Bartlett* also, in his answers to the fifth interrogatory in chief, and the fourth cross interrogatory, establishes the same point; but the evidence of *Paterson* himself, seems to me to leave no room for doubt. In his answer to the twelfth interrogatory, he says, "I told said plaintiff that I was about to get the possession of the said premises; I was about taking from the said *Bartlett* the equity of redemption, and asked the plaintiff if that was the correct way of getting the equity of redemption and taking the possession; the plaintiff said that he was the agent of Mr. *Forsyth*, and that he did not consider himself at liberty to give advice upon it." This observation, dropped incidentally, by a witness for the defendant, is felt to be much more satisfactory than any direct evidence which the plaintiff could himself offer; and it seems to me, not only to establish that *Paterson* had notice of the adverse claim of Messrs. *Forsyth & Bell*, but further, that he received such notice in a way most likely to fix his attention upon the subject.

I am of opinion, therefore, that the conclusion to be drawn from the evidence in this case is, that *Paterson* had notice of Messrs. *Forsyth & Bell's* mortgage at the time he obtained from *Bartlett* the release of the equity of redemption; and

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Judgment.

1850. I am further of opinion that the course pursued by *Paterson* had the effect of extinguishing the mortgage to *Row*, thus rendering that to Messrs. *Bell & Forsyth* the only incumbrance upon the property. It is obvious that the *Commercial Bank v. Street* is not an authority in favour of the defendant; nay, it is an authority for the plaintiff, because the court expressly recognised the English decisions upon which the plaintiff now relies, but distinguishing that case, determined them to be inapplicable, because notice to the purchaser of the mesne incumbrancer was negatived in the case then under consideration. With every disposition to assist a defendant who seems to me to have acted honestly throughout these transactions, I confess that I am unable to distinguish the case now before us from *Emmons v. Crooks*, and the authorities there cited. Sir *Edward Sugden* said, upon a recent occasion: (a) “Now I apprehend that the law is just the reverse, and that the cases establish, that if you with a prior incumbrancer buy the estate which is subject to a subsequent incumbrance, you let in the second incumbrance to the injury of your prior incumbrance; that in fact you lose your incumbrance.”

Judgment.

That I believe to be a correct statement of the rule which must govern the present case.

It was further urged upon this branch of the case, that *Bartlett* had not in fact any equity of redemption to release, because having mortgaged the premises in question to Messrs. *Forsyth & Bell*, without having disclosed the former mortgage, he is expressly deprived by the statute of William and Mary, (b) of his equity of redemption. Whether the defendant could, under any circumstances, make this objection, may well be doubted; that he cannot make it under present circumstances, is extremely clear. No such case has either been stated upon the record or established in proof. For aught that appears, the mortgage to Messrs. *Forsyth & Bell* may have recited the former incumbrance. But assuming it to be silent, that is quite consistent with the hypothesis that the mortgage to *Row* may have been disclosed to the second mortgagee. Evidence there is

(a) 2 Con. & Law. 455.

(b) 4 & 5 Wm. & Mary, c. 16, sec. 3.

none. It is obvious, therefore, that there is no shadow of ground for this argument. 1850.

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The objection to the prayer of the bill, which is for a sale and not a foreclosure, is at most but formal. Though the prayer for sale were incorrect, and though the appropriate relief could not be decreed under the general prayer, no doubt the bill might be amended in that particular, and the objection thus effectually obviated. But, before disturbing a practice established many years before I came to the bench, I must have seen very clearly that such practice was illegal. Such a course could not have been properly adopted, upon any mere opinion which I might have formed as to the inexpediency of the practice. But so far from considering the practice inexpedient, it seems to me to accord with the general doctrines of equity, in relation to mortgage transactions, much better than the proceeding by foreclosure, and to be, moreover, peculiarly adapted to the condition of this country. As to the illegality of the practice, I cannot say that I entertain any doubt that it is competent to this court to decree a sale instead of a foreclosure. It is true, indeed, that such is not the practice of Westminster Hall; but there, jurisdiction has always been assumed to decree a sale, in certain classes of cases, to which that mode of relief seemed peculiarly adapted; and, in Ireland, a decree for sale is the ordinary course. Mr. *Powell*, in his work on mortgages, thus enumerates the different classes of cases in which a sale may be prayed: (a) "1st, Where the estate is deficient to pay the incumbrance. 2nd, Where the mortgage is of a dry reversion. 3rd, Where the mortgagor dies, and the reversion descends on an infant. 4th, Where the mortgage is of an advowson. 5th, Where the mortgagor becomes bankrupt. 6th, Where the mortgage is of an estate in Ireland." Mr. *Story*, in his book on equity jurisprudence, adds one or two other classes. His first class is, where the estate is deficient to pay the incumbrance; and his 8th and last, (b) where the mortgage is of land, and by the local law is subject to sale; such as,

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(a) 2 Powell on Mortgages, page 1015 a note I. (b) 2 Story, E. J. sec. 1025 & 6.

1850. for example, in Ireland and America. The statement to be found in Mr. *Petch's* work on mortgages is to the same effect. The present case clearly falls under the first of these classes, for the estate is confessedly insufficient to meet the plaintiff's claim. Mr. *Coote*, indeed, hesitates to accede to the position laid down by the other text writers to whom I have referred, and says that it is not supported by authority. But on questions respecting the practice of Westminster Hall, books of this class must, with us at least, be regarded as considerable authority in themselves, because we are debarred from the ordinary sources of information; neither are the records of the court within our reach, nor can the officers of the court be consulted. However, direct authority is not wanting to support this practice, and it is besides in accordance with reason. *Dashwood v. Bithazey* (a) would seem, in principal at least, in point; and in *Earl Kinnoul v. Money*, (b) Lord *Hardwicke* says, "the tenant for life of an estate subject to a mortgage is not entitled to pray such relief, (a sale,) though the mortgagee himself might be if he thought it a scanty security." The caution exercised in transactions of this description in England, would have led us to anticipate the want of clear authority which is found to exist. I am of opinion, notwithstanding, that sufficient authority has been found to warrant the conclusion, that in England a prayer for sale is proper, where the security is scanty. That point, is, however, of less importance, because I think that in this country it is competent to a mortgagee, in every case, to pray a sale, instead of a foreclosure. Land, with us, being subject to sale under execution, every mortgagee in this country comes within the last class of cases enumerated by Mr. *Powell* and Mr. *Story*, where a sale may be ordered instead of a foreclosure. But, irrespective of direct authority, the practice seems amply justified by reason; for here, where lands may be sold for the satisfaction of debts of every class, it would seem absurd that a court of equity should refuse to a mortgagee, in relation to the mortgage estate, the same remedy that every creditor may have in a court of common

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(a) Mos. 196.

(b) 3 Swan, 202.

law, in relation to the real estate of his debtor, although in no way pledged for the security of his debt. Equity in this, as in other respects, should follow the law. It should not extend the remedy by equitable execution, further than it is extended by legal execution; but neither should equity, especially in contracts of this class, where the doctrines of this court favour so decidedly the mortgagor, leave a mortgagee to the imperfect remedy afforded by foreclosure, where complete justice may be done by a sale. I am of opinion, therefore, that the practice which we found established here should not be disturbed, because I think that a decree for sale harmonises with the general doctrines of equity, in relation to mortgages, better than a decree for foreclosure; because it is, as I humbly conceive, supported by authority, and because it seems to me peculiarly suited to the condition of this country.

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It is next argued that the plaintiff is not entitled to a decree, because he purchased the property from his client while the relation of attorney and client subsisted, and at a price grossly inadequate. I shall pronounce no opinion as to the effect which properly belongs to the evidence adduced upon this point, because, assuming this defence to be open to *Harrison*, which I do not mean to decide, it is quite obvious that no such case has been made upon the record; and it is equally obvious that such a defence, to be available, must be distinctly opened in the pleadings. It is stated in the answer, indeed, that the plaintiff at the time of his purchase was the attorney of Messrs. *Forsyth & Bell*, but that fact is not stated in connexion with the defence now insisted on, but in the course of a statement introduced with an entirely different purpose, upon which was founded the objection I am now about to consider.

Judgment.

It is argued that the plaintiff is, at all events, precluded from obtaining this relief, because, as the agent of those interested in the subsequent security, he expressly sanctioned and encouraged the sale to *Paterson*, which he now seeks to avoid, to the utter destruction of *Harrison's* interest. Had the evidence supported the allegation, the principle applicable to the case would have been extremely

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plain. The plaintiff would have been then in the position of a person making a representation to one about to deal in a matter of interest upon the faith of that representation, and would not have been heard afterwards to set up a title in himself contray thereto. But I am of opinion that the evidence does not support the allegation. It does, indeed, appear that the plaintiff, as the agent of Messrs. *Forsyth & Bell*, did, upon the application of *Bartlett*, assent to his releasing the equity of redemption to *Paterson*. Why *Bartlett* should have asked permission, and what benefit was expected from it, cannot very readily be discovered; unless it is to be looked upon simply as the act of a debtor desirous to conciliate his creditor. But by whatever motive prompted, there is no evidence sufficient to lead even to a probable conjecture that *Paterson* knew of the application, or was in any degree influenced by it. On the contrary, *Paterson* himself swears, that when he applied to the plaintiff for information or advice on the subject, the plaintiff fairly informed him that, being the attorney of *Forsyth & Bell*, he was not at liberty to give him any directions. And I may observe of the whole evidence, that I do not find in it anywhere traces of a concerted fraud. The plaintiff may be thought to have made a harsh use of the advantage the law has given him; with that we have nothing to do—our duty is to administer the law. But throughout the transaction, all parties seem to me to have acted fairly.

Judgment.

I have considered minutely the objections taken to the plaintiff's case upon the merits, because of the deplorable loss which a decree in his favour must inflict upon a defendant to whom no suspicion of blame is attached; but I have not found in any of them reason sufficient to warrant us in dismissing the bill. The defendant, in attempting to improve his position, ignorant of the law, or mistaking the effect of his own acts, has in effect extinguished his security, and thus lost every thing; but the law must not be bent, even for the purpose of sheltering an innocent defendant from calamity. Unfortunate as the defendant's position is felt to be, we must not endanger the general

interests of the community in seeking to avert the legitimate consequences of that position, which would be the necessary result of shaking the settled principle of law for his protection.

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BARNHART V. PATTERSON.

Practice—Mortgage—Notice—Evidence.

Where a party charged one of the defendants with notice of his title, and evidence was adduced of several conversations in which notice was distinctly proved to have been given to the defendant: *Held*—that those conversations were admissible in evidence, although not particularly mentioned in the bill, as the fact of *notice*, and not any particular conversation, was the point in issue.

Where a party made an assignment of his interest, by way of security, which on the face of it purported to be absolute, and remained in possession from the time of the execution of the assignment till the time of the hearing, parol evidence was admitted, to show what the real nature of the transaction was.

The bill in this case was filed for the redemption of a mortgage on certain lands in the township of Toronto, and from the statements therein it appeared that the plaintiff had formerly been carrying on business as a merchant, and having become involved and unable to pay all his liabilities, had applied to his brother-in-law *Patterson*, one of the defendants, to assume a debt due by plaintiff to *Fisher, Hunter & Co.*, of £296, or thereabouts; and for securing the payment to *Patterson* of the debt so assumed by him, plaintiff, in April, 1834, assigned to him a contract for the sale by the Corporation of King's College to plaintiff of the premises in question, being lot No. 6, in the 5th concession of Toronto, west of the centre road, and which was to be re-assigned to plaintiff so soon as *Patterson* should be paid the said debt and all such other sums as he should be obliged to pay to the College for the purpose of obtaining a conveyance of the land; and that plaintiff had always, by himself or his agents, remained in possession of the premises, and had made many valuable improvements on the property; that the property from lapse of time and other circumstances, had now become worth £2,000; that plaintiff had from time to time paid *Patterson* sundry sums of money, and advanced to him goods, &c., for the purpose of re-paying him all the money advanced by him on the said security, and had frequently applied to *Patterson* for a statement of the account.

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The bill then alleged that *Patterson*, in October, 1839, executed an assignment of the contract to *James B. Greenshields* by way of security for a debt due to him from *Patterson*, and which assignment was taken by *Greenshields* without any enquiry being made by him of plaintiff or his agents or tenants, as to the possession so held by plaintiff; and afterwards paid to King's College the amount due on the contract, and obtained a conveyance in fee to himself. The bill then stated that plaintiff had frequently offered to pay *Patterson* whatever was justly due him, and also offered *Greenshields* to re-pay his advances to the College, and asked him for a conveyance of the property. The bill charged that *Patterson* had denied his having assigned the contract, and that the defendants alleged that the assignment from plaintiff to *Patterson* was absolute and without any agreement for redemption; but plaintiff charged the contrary to be the fact, and as evidence thereof that *Patterson* had kept accounts between plaintiff and himself in which the moneys paid to *Fisher, Hunter & Co.*, and instalments paid to King's College, were charged against plaintiff; that *Greenshields* had never demanded possession of the premises or rent therefor, nor had he ever intimated any right to make such demand; and that when he *first had notice* of plaintiff's claim, *Patterson* owed *Greenshields* only a small sum, and this was secured upon other property, but that he wished now to charge subsequent advances made by him to *Patterson*.

The answer of the defendant *Patterson* admitted the statements in the bill, showing that the assignment by plaintiff to *Patterson* was by way of security, the keeping of accounts in which he had charged plaintiff with the amounts paid to *Fisher, Hunter & Co.*, and King's College, also plaintiff's application to him for an account, and his assignment of the contract to *Greenshields*, who he alleged was not aware of the conditional assignment to *Patterson*.

Greenshields, by his answer, denied all knowledge of plaintiff's claim, and stated that he was not aware that *Patterson* had not taken possession of the property.

The other statements in the pleadings are not important in the decision of the case.

The prayer of the bill was—first, for redemption on payment of what should appear due from plaintiff to *Patterson*, on the foot of the security—secondly, if it should appear that *Greenshields* had advanced moneys without notice or fraud, and the court should be of opinion that *Greenshields* was entitled to hold the premises as security therefor; then, if the amount due by *Patterson* to *Greenshields* exceeded the balance due by plaintiff to *Patterson*, it might be declared that the other lands conveyed by *Patterson* to *Greenshields* should be first charged and a sale ordered, the proceeds to be applied in paying *Greenshields*, and if insufficient, then that plaintiff might be let in to redeem upon payment of the balance—and thirdly, if *Greenshields* should be found to be the absolute purchaser, without notice or fraud, then a reference to the master to ascertain the value of the premises, and that *Patterson* might be decreed to purchase lands of equal value, to hold upon the same trusts as the said premises were subject to.

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The cause came on to be heard before Vice-Chancellor *Jameson* (before the new constitution of the court). After the cause had been in part heard, and it appearing from the evidence taken on the part of the defendant, that plaintiff had on a former occasion, when in prison for debt, made a deposition, in answer to interrogatories, that he had not any interest in the premises in question in the cause, a reference on the motion of the defendants was ordered “to the master to enquire and state to the court whether the plaintiff was at any time, and when, confined in the gaol of the Home District as a debtor; and whether at or about such time he made any and what oath or deposition, as an insolvent debtor, to the effect that he did or not possess any property or own any interest in the premises in question in this cause.” The master, by his report, found that plaintiff had made oath that he was not worth five pounds, but not to the effect that he had not any interest in the premises in question, unless the same be contained in the affidavit aforesaid; and the hearing of the cause was now proceeded with before the two Vice-Chancellors, when it was shortly argued by Mr. *Morrison* and Mr. *Alex. McDonald*, for the plaintiff, Statement.

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who contended that the reference that had been made was utterly useless ; for aught that appeared, plaintiff may have considered in his mind that he had not any interest, but, even if the plaintiff had, in making the statement he did, sworn to any thing which was not correct, still it could only be treated as an admission, and being so, plaintiff was at liberty to show the truth afterwards. Amongst the cases cited as authorities on this point were: *The King v. Clarke*; (a) *Heane v. Rogers*; (b) *Ellis v. Watson*; (c) *Lackington v. Atherton*; (d) *Woodley v. Brown*. (e)

Judgment.

Plaintiff having been always in possession was sufficient notice to *Greenshields*; but here it is not necessary to urge that point, as the evidence of several of the witnesses establishes, beyond doubt, that *Greenshields* had sufficient intimation of what the state of the title was, and if not sufficient to satisfy his mind that plaintiff was the owner of the premises, there can be no doubt that ample notice was given to him to put him on enquiry; had he enquired further, he would have ascertained the exact position of the title. *Hammond*, *Bennett* and the witness *Barnhart*, all swear that they told *Greenshields* that plaintiff owned the property; this, it was contended, was sufficient to put him on enquiry; and though no enquiry was made, still he must be looked upon as having had notice of plaintiff's title.

Jones v. Smith, (f) and *Penny v. Watts*, (g) were referred to.

Mr. *Crooks* and Mr. *Morphy*, for the defendants, contended that the evidence establishing the fact of notice in *Greenshields* was not such as ought to satisfy the court that he had notice; and without notice it was clear he would be entitled to hold the premises as a security for the whole amount of the balance due to him from *Patterson*.

They contended also, that the plaintiff, having formerly sworn that he did not own the premises in question, or any interest therein, ought to be estopped from asserting the claim now advanced in this court.

They referred to *Watson v. Wace*; (h) *Curran v. Urqu-*

(a) 8 T. R. 220. (b) 9 B. & C. 577. (c) 2 Starkie, 478. (d) 7 M. & G. 360.
(e) 2 Bing. 527. (f) 1 Hare, 43. (g) 13 Jurist, 459. (h) 5 B. & C. 153.

hart, and *Curran v. McGrath*, in the Court of Queen's Bench in this province—not reported. 1850.

ESTEN,* V. C., delivered the judgment of the court.

The material facts of the case are, that the plaintiff, after contracting in writing and under seal for the absolute purchase of the property in question with the Corporation of King's College, to whom it belonged, at the price or sum of £250, payable by ten annual instalments, with interest; and having entered into possession of the property, by virtue of the contract, executed an assignment of it to the defendant *Patterson*, which was absolute in form, but intended as a security for a debt of £296 0s. 3d., due from the plaintiff to Messrs. *Fisher, Hunter & Co.*, of Montreal, for which *Patterson* had become liable, together with any moneys which *Patterson* might pay to King's College for the completion of the purchase, and, as it is alleged by *Patterson*, a debt of £195 due from the father of the plaintiff, for which he had become liable, with interest on those sums.

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This assignment was executed in 1834, from which time to the present the plaintiff has remained in the possession and in the receipt of the rents of the property. He likewise paid some moneys to *Patterson* on account of the instalments of the purchase money of the land, and *Patterson* kept accounts relating to the property, which, it is contended, afford sufficient evidence in writing of the real nature of the transaction. *Patterson*, in 1839, made an assignment of this property to the defendant *Greenshields*, on behalf of the firm of which he was a member, confessedly by way of mortgage, for the purpose of securing to that firm a debt then due, and any further advances that they might make to him. *Greenshields* insists that he had no notice of the plaintiff's claim until the commencement of this suit. He, however, admits the title of the College, and the contract with the plaintiff; also the assignment to the defendant *Patterson*, and the conditional assignment to himself on behalf of the firm of which he was then a member. He also admits that £1,418 was then due, and

*The Chancellor was engaged in the cause when at the bar.

1850. further advances desired, to secure which, and the previous debt, it was agreed that the contract, *inter alia*, should be assigned, the purchase completed, and the fee simple conveyed to the defendant *Greenshields*; that such assignment was made accordingly, and that the firm paid £193 19s. 7d. to King's College, whereupon the lot was conveyed to *Greenshields* in fee.

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If, therefore, the plaintiff can prove that he had an equity of redemption when he instituted this suit, he will be entitled to a decree, at all events, upon paying *Greenshields* all that may be due to him; but if he can prove notice in *Greenshields*, then upon payment of what was then due to him, or of what is due to *Patterson*, as the case may be.

It is admitted that an equity of redemption was not expressly limited, but is to be raised upon circumstances, and it may have existed at one time and not at another, according to the dates of those circumstances. The questions raised seem to be these:

Judgment.

1st. Had *Barnhart* any equity of redemption at the time of the assignment to *Greenshields*; for if, in the eye of the law, *Patterson* had an absolute estate, he subjected it to the whole of *Greenshields'* demand, whatever he may have intended in his own mind.

2nd. When did this equity of redemption spring up; and

3rd. When, in either case, did *Greenshields* first have notice of it, for although if *Patterson* had, in the eye of the law, an absolute estate at the time of the mortgage to *Greenshields*, he thereby rendered it subject to *Greenshields'* entire demand, whatever he may have secretly intended in his own mind; yet, if he afterwards made any admission, or became party to any act whereby his estate was reduced to a mortgage, it is apprehended that *Greenshields* would not, after notice of such a fact, be justified in making any further advances, supposing the equity to be clear.

Patterson admits all the same facts, and, in addition, the mortgage or the equity of redemption in the plaintiff.

This admission in the answer would alone reduce *Patterson's* estate to a mortgage, but would not affect *Greenshields*, if nothing previous had occurred to produce the same effect. We are to enquire, therefore:

1st. Whether parol evidence is admissible to prove this absolute assignment a security? 1850.

2nd. Is the parol evidence in the present case sufficient for this purpose? Barnhart
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3rd. When did the equity of redemption claimed by the plaintiff first exist, and when had *Greenshields* notice of it? First. Is the parol evidence admissible in the present case to prove that this absolute assignment was intended as a security only?

I do not desire to express any opinion as to whether parol evidence is in every case admissible, for the purpose of shewing that an absolute conveyance was intended to operate by way of mortgage, but I think where possession has been taken or kept by the mortgagor under the agreement, it is sufficient to render the parol evidence admissible.

It must be clearly referable to the agreement, but such will be the legal inference in case there is nothing else to which it can be referred. (a)

The evidence is received on the same principle that it is in case of a purchase. Judgment.

The title is in one, the possession in another, the evidence is receivable to account for that possession; because, if it were under a purchase it is a fraud for the vendor to treat it as a trespass. So in case of a mortgage, the title and possession do not accompany each other. A. is in possession of B.'s land; the evidence is admissible to explain that possession, because if it is under a mortgage, it is a fraud in the mortgagee to treat it as a trespass, and when explained it must be referred to the agreement, because there is nothing else to which it can be referred.

It is quite clear, that when the mortgagor has kept possession and received the rents, and applied them to his own use, without any expectation of being made accountable for them, and has been encouraged to do this by the mortgagee, he cannot be treated as liable for these very rents. Both parties have acted on the agreement in such a way, that it would be a fraud on the mortgagor not to carry it into effect. The mortgagee has permitted the mortgagor to act

(a) Gregory v. Mighell, 18 Ves. 328.

1850. on the agreement, so that he cannot be allowed to say there is no such agreement.

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If the court is to restrain the action, it must enforce the real agreement, or *do what is much stronger*—it must prevent the supposed purchaser from receiving the rents of his own estate, and compel him to accept interest on money not due to him, while it enables the seller to retain the rents of another man's property, and compels him to pay interest on money which he does not owe—and this on a contract for purchase completed long before, on both sides, by conveyance and payment of the purchase money. There are no such inconsistencies in the case of a parol contract for purchase, where the vendor remains in possession, but the purchaser pays his money. There each party in the end retains his own property, the vendor receives his own rents and the purchaser his purchase money, which in the event is really due to him, with interest.

Judgment. If the evidence is admitted, the contract must be enforced as it really is. It would be impossible to execute the real agreement to a certain point, and then return to the apparent transaction, and put it in force from that time. If the real agreement is executed at all, it must be executed *in toto*.

The same result follows from payment of mortgage money—suppose a mortgage to be made by an absolute conveyance, and the money advanced to be collaterally secured at the same time by a bond, or a note; or if no bond or note should be given, that it is distinctly proved by a person who was present, that the money was advanced as a loan to be repaid; and an action to be afterwards brought upon the bond or note, or the assumpsit for its recovery, and the defendant to produce the deed as a satisfaction of the demand; it is apprehended that the court would necessarily hold the transaction to be separate, and would not admit evidence connecting the two transactions, so as to make the deed a satisfaction of the debt, contrary to the intention of the parties.

Again, when the mortgage is by an absolute conveyance, made to secure an antecedent debt, for the recovery of

which an action is afterwards brought, and the deed is produced as a presumable satisfaction, but no debiting, or crediting, or receipt is shown, or subsequent acknowledgment of the debt is proved, it is apprehended that the same result will follow; or should the evidence be admitted, not for the purpose of varying or contradicting the deed, but of rebutting the presumption arising from its contemporaneous execution, such evidence clearly shewing that the execution of the deed was not intended to be a satisfaction of the debt, the court would not hold it to be so, in contravention of that intention, but would leave the party to seek relief elsewhere.

The case is still stronger where the debt is actually repaid. In the face of this unequivocal fact, the court could not presume a deed previously executed, and reciting, that in consideration of a certain sum then paid, certain lands were thereby conveyed, to be a satisfaction of this debt.

In this case the mortgagor, having re-paid the debt voluntarily, or in compliance with a demand of re-payment, would have to bring an action for its recovery. Should he be allowed to go into evidence of the real transaction, and shew that the absolute deed was intended as a security, and that he re-paid the debt in expectation of having his land re-conveyed to him, but that the creditor has refused to make such re-conveyance, it is considered that he would not be permitted to recover it, because the case was one, not of failure of consideration, but of re-payment of a debt; everything that had been done, was so done in accordance with the real intention of the parties, and the refusal of a re-conveyance was a fraud for which, undoubtedly, in such a case, a remedy would exist elsewhere.

In short, when an advance or a debt is shewn, and a contemporaneous execution of a deed for the same amount as the consideration, it may be conceded for the sake of the argument, that the two transactions would be connected, and one would be presumed to be a satisfaction of the other. A defect of proof would then exist. But whenever this presumption can be repelled by evidence, the debt will be considered as subsisting, and its recovery will be permitted

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1850. or its voluntary re-payment sustained, because such a course is in accordance with the actual intention of the parties, and no defect of remedy exists; since of necessity, if the debt is deemed to have subsisted, notwithstanding the execution of the conveyance, it is a fraud in the creditor to receive re-payment of the debt, and yet to keep the land; and this enables a court of equity, in accordance with its general principles, to receive the evidence of the deed being intended as a security only, and then the debt secured being paid, the creditor becomes a trustee for the debtor.

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The admission at law of the evidence of the whole transaction will not vary the case, since it only shows the more unequivocally the real intention, that the debt shall continue due, notwithstanding the execution of the conveyance, and then its recovery or voluntary re-payment being permitted in accordance with such intention, the creditor receiving the debt and refusing to re-convey the land, is guilty of a fraud, which gives a court of equity jurisdiction to treat the absolute conveyance as a security merely; and then satisfaction of the debt secured being shewn, the creditor becomes a trustee for the debtor.

This result necessarily follows in every case where the debt is voluntarily re-paid, because the fact of re-payment repels the presumption of satisfaction from the contemporaneous execution of the conveyance. This is the case to which I am now addressing my attention; and therefore I conclude, that wherever an absolute conveyance has been executed for the purpose of securing a debt, and the debt or any part of it is afterwards re-paid, parol evidence is admissible in equity, to shew the real nature of the transaction.

I am not aware that any adjudged case can be produced, shewing that parol evidence is admissible in the abstract to prove that an absolute deed was intended only as a security.

I have already said that I do not wish to express any opinion upon this point, but I think the proposition may be safely and usefully laid down, that parol evidence is admissible to prove an absolute deed a mortgage in all cases of fraud, mistake, accident or surprise, or where subsequent

dealings have taken place between the parties inconsistent with the fact of the deed being absolute, and causing a fraud to be committed on the mortgagor, in case the evidence is excluded. For this latter proposition I am not aware whether any other authority can be cited than the case of *Letarge v. D'Thyull*, (a) decided in this court; but this I consider sufficient, both because that decision is binding upon us, and because I entirely concur in the doctrines advanced in it; and, indeed, one object which I had in view in going so particularly into the doctrine of this case, was to express my entire concurrence in a determination in which I was precluded from taking any part.

I do not hesitate, indeed, to carry the doctrine of that case one step further than it was there carried; for I am clearly of opinion, that where an absolute deed is shewn to have been executed by way of security, and the mortgagor remains in possession and receives the rents and profits, and applies them to his own use without account or molestation, it must be intended that he so remained in possession as mortgagor with the sanction of the mortgagee, and then undoubtedly it is a fraud in the mortgagee to treat the mortgagor as a trespasser, and to make him accountable for rents and profits which he sanctioned his receiving and disposing of in another character. The case is very different from that of a tenant who, being in possession under a lease, purchases the land and simply remains in possession. There the possession is referable to the lease, and no decided act of part performance can be shewn. But in case of an absolute deed executed by way of security, the possession of the mortgagor must be referred to his title as such, since there is nothing else to which it can be referred. (b)

In the case before me, the possession of the plaintiff and the absolute deed being intended only as a security, are clearly proved by the evidence of *John Barnhart*; and although his evidence has been impeached, and would under other circumstances be justly liable to suspicion from the

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(a) Ante, 227.

(b) *Gregory v. Mighell*, before cited; *Morphett v. Jones*, 1 Swan. 172.

1850. strong interest which he manifests in the case, yet I hold it to be conclusive upon these points, for two reasons ; one is, that it has not been impeached successfully—the other, that it is corroborated by the answer of *Patterson* in a manner which places its truth beyond controversy ; and although the answer of *Patterson* cannot be read against *Greenshields* as evidence, yet the fact being proved by evidence, and the question being whether that evidence is true or not, I think the answer of *Patterson* may be looked at for the purpose of seeing whether it contradicts or corroborates that evidence. It is to be observed that the answer of *Greenshields* does not deny these facts, and therefore the evidence of one witness is sufficient for their establishment, provided it is true. Now the truth of *Patterson's* answer in this respect is incontestible. The admission is against his interest, and he is evidently more in the interest of *Greenshields* than of the plaintiff.

Judgment. The possession and the redeemable nature of the estate are then incontrovertibly established, and the possession having continued for five years, when the mortgage to *Greenshields* was made, the estate of *Patterson* was then redeemable in point of law, and therefore the only title which he could legally confer upon *Greenshields* was a redeemable one ; but inasmuch as his estate was apparently absolute, although in fact redeemable, it is necessary to enquire when *Greenshields* first had notice of the plaintiff's title, because he will be entitled to hold the property as a security for all advances made before he received such notice. Now I am of opinion that *Greenshields* had notice of the plaintiff's title in the year 1839. It is true he denies notice. Whether that denial, except as to the possession, is altogether satisfactory, may perhaps be questioned. Assuming it, however, to be so, notice is proved by the evidence of four witnesses—namely, *Hammond*, *Charles Barnhart*, *Bennett*, and *Phillips*.

The testimony of *Hammond* and *Charles Barnhart* has not been questioned ; and although that of *Bennett* has been impeached, not only has it been supported by counter evidence, adduced for that purpose, but the conversation which

he details, as evidence of notice on the part of *Greenshields* of the plaintiff's title, has been attested by another witness of unimpeached credit.

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These conversations are admissible in evidence, although they are not particularly mentioned in the bill, according to the rule mentioned in *Daniel's* Chancery Practice, (a) and applied in the case of *Hughes v. Garner*. (b)

The witnesses speak to different conversations, but they are all witnesses to the fact of notice, which—and not any particular conversation—is the point in issue.

The same circumstance occurred in *Jolland v. Stainbridge*, (c) and the evidence was not objected to on that ground. The witnesses do not appear to have been aware of the fact of the assignment to *Patterson*, with the exception of *Hammond*, who might perhaps have known it; *Hammond*, in his communication to *Greenshields*, referred to *John Barnhart*, although *Greenshields* probably understood him to mean the plaintiff; and the plaintiff does not appear to have been in the country at the time. These circumstances have not escaped my notice, but I think they are immaterial. It appears to me that these communications not being vague rumours, but proceeding from persons to whom *Greenshields* had applied for information relative to the property with reference to that particular transaction, invited and merited his attention; that he ought to have enquired further, and that proper enquiry would have led to a knowledge of all the facts of the case and of the plaintiff's title, of which therefore he must be deemed to have had notice. I have perused with great attention the reports of the case of *Jones v. Smith*, in 1 Hare and in Phillips, (d) and the remarks upon it of Vice-Chancellor *Wigram*, in 2 Hare 257, and I think this case within the rule there stated; and I think that if the notice in that case had been similar to what it is here—in other words, if *Smith*, instead of being told that there was a settlement which did not affect the property in question, had been credibly informed that that particular property did not belong to *Jones*, but to his wife and children, Vice-Chancellor *Wigram* would have held the notice

Judgment.

(a) Vol. 2, p. 415. (b) 2 Y. & C. 328. (c) 3 Ves. 478.

(d) 1 Hare, 43, 1 Ph. 244.

1850. sufficient. I think, therefore, that possession having been shewn in the plaintiff from the execution of the assignment to the time of producing the evidence, parol evidence was admissible to explain the real nature of the transaction; that the evidence which was adduced for this purpose placed beyond doubt that the assignment to *Patterson* was intended merely as a security; that his estate was a mortgage at the time of the assignment to *Greenshields*; and that *Greenshields* had notice of the plaintiff's title in 1839. It being matter of dispute between the plaintiff and *Patterson* how much was intended to be charged upon the estate, an enquiry must be directed for the purpose of settling this question. An account must also be taken of what is due and owing from *Patterson* to *Greenshields*, and it must be ascertained how much of the amount appearing to be due was advanced after the year 1839.

Judgment. For this amount *Greenshields* can claim a lien only to the extent of the debt due to *Patterson*. If any part of what remains due was advanced before that time, it must be paid, and an account must be taken of what is due to *Patterson*. The usual decree will be made in the case of a derivative mortgage. *Greenshields* is of course entitled to charge the whole amount paid to the College.

Patterson acted improperly in making the assignment to *Greenshields*, without communicating to him the nature of his title; but inasmuch as *Greenshields* had notice of that fact *aliunde*, this neglect has produced no ill consequence; and I think, therefore, that *Patterson* must have his costs as usual in redemption suits. I think *Greenshields* should not have his costs of taking the evidence. His other costs he must have as a mortgagee. As to the effect of the master's report in this case, it is quite clear that the plaintiff is not precluded by the affidavit mentioned in that report from claiming this property. The reference was unnecessary, as it could produce no effect whatever, even supposing the fact, which it was the object of it to ascertain, to be established. It was directed, as I understand, *ex parte*. Mr. *Greenshields* is not entitled to the costs of this reference.

Since writing the above, I have examined the exhibits, which

I had not before seen. The accounts produced do not appear to me sufficient *per se* to warrant the admission of parol evidence, according to the rule laid down in *Cripps v. Jee*, (a) and recognised in *LeTarge v. D'Tuyl*. They all appear to me to be consistent on the face of them, with the fact of an absolute purchase, and do not therefore shew that the transaction was different in fact from what it purported to be. The only payment that appears to me to be proved, is part of the instalment on the purchase money due to the College, and the time of this payment is not shewn, but might, if necessary, be the subject of enquiry. It is not however necessary. I decide the case upon the ground of the possession, clearly shewn to have been held by the plaintiff for five years, when the mortgage to *Greenshields* was made, and unequivocally referrable to the plaintiff's title as mortgagor. (b)

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The decree drawn up in this cause declared Patterson to be a mortgagee of the premises in question; that the premises were to stand as a security to *Greenshields* for the amount paid to King's College and for all advances made to Patterson, to the extent of such sum as should appear due from *Barnhart* to Patterson; a reference was directed to the master to enquire what the assignment from *Barnhart* to Patterson was intended to secure, and what remained due for principal and interest thereon: and ordered, that upon payment by *Barnhart* to *Greenshields* of what was due from *Barnhart* to Patterson, if that did not exceed the amount due by Patterson to *Greenshields*, together with *Greenshields*'s costs of this suit, except the costs of taking the evidence and of the reference, and upon payment to Patterson and to the assignees of Patterson's estate, of their costs of the suit; but if the amount due by *Barnhart* to Patterson should exceed that due by Patterson to *Greenshields*, then upon payment to *Greenshields*, of the principal money and interest due him, and his costs as before-mentioned, and payment of the balance and costs to the said assignees, plaintiff to be let in to redeem, &c. Payments by *Barnhart* after notice of assignment to *Greenshields* not allowed. [But see effect of order of Court of Appeal, as reported *post* vol. III., p. 106.]

Judgment.

NEWTON V. DORAN.

Practice—Injunction—Costs.

Where a plaintiff having obtained the common injunction for want of answer, upon a bill defective for want of parties, the defendant put in his answer and obtained an order *nisi* to dissolve the injunction; before the motion was heard, and on the morning of the day on which it was heard, the plaintiff amended the bill by adding the necessary parties: *Held*, that such amendment was an answer to the objection, made on the motion, of want of parties; and as the amendment consisted entirely of the addition of parties, and did not materially alter the position of the defendant, and he had not pointed out the objection by his answer, the court refused him the costs of the motion up to the time of the amendment.

(a) 4 Brown C. C. 472.

(b) *Harris v. Horwood*, Gilbert's Rep. 11.

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The bill filed in this case stated, that the plaintiffs had entered into partnership with the defendant *Doran*, and that in carrying on such co-partnership (under the articles of agreement therefor, and which were recited at considerable length in the bill) the defendant *Towns* had been employed as manager and cashier.

Judgment.

After detailing a variety of transactions and disputes between the members of the co-partnership, the bill alleged that the complainants had been kept in utter ignorance of the state of the accounts by fraudulent and improper means on the part of the defendant *Doran* in collusion with *Towns*, and charged different fraudulent practices against *Doran* and *Towns*. It further stated that the property purchased with the moneys of the co-partnership consisted of several lots of land, for two of which the patent had been issued in the name of one *William Wilson*, who was beneficially interested in the share of *Sarah Wilson*, one of the plaintiffs; that in order to prevent *Towns* from further injuring them, the plaintiffs had caused him to be dismissed from the partnership employment; and that he had since commenced an action against the plaintiffs and *Doran* in the Court of Queen's Bench for a large sum of money alleged to be due him by the firm. The bill charged that the plaintiffs did not owe him the sum of money claimed, or in fact any debt, and that such would appear to be the case if a discovery were made of the books, &c., of the partnership, during the time that *Towns* acted as such cashier and manager; and that *Towns* had books and papers in his possession which would shew that no such debt was due to him. The bill further charged, that *Towns* knew he was largely indebted to the firm, and prayed that an account might be taken of the partnership dealings, and that *Doran* might be restrained from receiving the debts due to the partnership, and that *Towns* might make a full and true discovery of the several matters set forth in the bill, and that he might be restrained from proceeding in the action at law, and for further relief.

The defendants having made default in answering, an injunction issued in the terms of the prayer of the bill.

The defendants afterwards answered, denying all fraud

and collusion. *Towns* set forth an account of the moneys received and paid out by him, but did not swear positively that any sum was due to him from the partnership.

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An order *nisi* having been obtained, it was now argued by Mr. *Turner* for the defendants, that no grounds existed, in this case, for the injunction being upheld, and contended that it must be dissolved, for the following reasons :

1st—*William Wilson* being a person beneficially interested in this litigation, should have been made a party.

Mr. *Read*—*Wilson* has been made a party by amendment this morning, before the sitting of the court.

2nd—There is no equity shewn for the relief prayed, no relief whatever is prayed as against *Towns*, except an account. Now, this is not relief but discovery, and a plaintiff is not at liberty to file a bill for discovery as against one defendant, and for relief as against others.

[ESTEN, V.C.—I do not recollect any instance of such a bill.]

3rd—The amount claimed by the defendant *Towns* should be paid into court, as a condition of continuing the injunction. Statement.

4th—The answer denies all combination and collusion, and therefore on that point there is not any ground for the interposition of this court.

Mr. *Mowat* and Mr. *Read* for the plaintiffs.

Towns having been the manager and cashier of the whole of the partnership business and funds, he has been made a party for the purpose, not only of obtaining from him, under oath, such information as will enable the plaintiffs effectually to prosecute the suit for relief against the other defendants, but also of an account against him.

Although it is possible that in the state the bill was filed originally the injunction could not have been sustained, still, on the authority of *Fisher v. Wilson*, decided in this court, they contended that the defendants were bound to shew that the answer had removed the equities stated in the amended bill, otherwise the court would not dissolve the injunction which had been obtained. As to the objection that had been made that the money must be paid into court, there was nothing, they submitted, in it. Here, no

1850. verdict has been obtained, and *Towns*, in his answer, has not ventured to swear that any sum is due to him. In such a state of facts, the only course which could safely be adopted by the court, would be to retain the injunction until the accounts of the co-partnership were finally taken; or if that should be deemed to be improper, then *Towns*, at all events, should be restrained from proceeding further than judgment until an account could be had.

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Amongst the cases cited by them were, *Attorney-General v. Craddock*, (a) *Campbell v. McKay*, (b) *Mills v. Campbell*. (c)

Mr. *Turner* asked for the costs of the motion if it should be considered that the amendment which had been made, and which could only have been made within a few hours, prevented the injunction from being dissolved; for this he relied on *Fisher v. Wilson*. (d) On the other side it was contended that this was not a case for giving the costs; here no difference of statement is made in the amended, from what was set forth in the original bill, while in *Fisher v. Wilson* an entirely different case was set up by the amendment.

Judgment.

ESTEN, V. C.—The bill shews that *Towns* has acted as manager and cashier, and received and paid moneys for many years without rendering any account. It also shews that he has commenced an action at law against the firm; and it alleges that nothing is due, or no such debt as is claimed, which indeed the complainants, according to their own statement, cannot know; but it is only reasonable that these transactions should be investigated before *Towns* is permitted to levy his whole demand, provided he is not unreasonably delayed thereby.

This bill must be treated as one for relief against *Towns*; it prays that *he* may make a discovery; and be restrained from proceeding at law; and there is a prayer for further relief. He is not bound to make any discovery; an account, however, may be obtained under the general prayer; and an injunction may of course be obtained, if proper.

(a) 3 M. & C. 85. (b) 1 M. & C. 603. (c) 2 Y. & C. 389.
(d) Ante, 218.

Then, is this proper to be conjoined with the other purposes of the suit? 1850.

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The case is not indivisible—separate bills might be maintained; but the objection has not been raised by demurrer or answer, and cannot therefore be made by the party at the hearing, or upon any interlocutory application. The court may raise it, but in this case, instead of any inconvenience, great benefit would be derived from suffering the suit to proceed; for the demands of *Towns* against the firm, and of the firm against *Towns*, arise from the partnership business, and the account of his proceedings is necessarily involved in that relating to the dealings of the firm, and is, in fact, one and the same thing.

We think, therefore, that this objection cannot prevail.

Wilson seems a necessary party, and, under these circumstances, two questions arise—first, whether the injunction must be dissolved without amendment of the bill; and if so, whether the fact of the bill being amended saves it. It seems that without amendment it must be dissolved.

Judgment.

We are of opinion, however, that according to the present practice of the court, an amendment made before a motion is made to dissolve an injunction will save it; but that, according to the decision of *Fisher v. Wilson*, the party applying to dissolve the injunction must in general have his costs up to the time that he received notice of the amendment, and may proceed with his motion, if necessary for that purpose.

Upon the answer it is plain that the defendant *Towns* has commenced an action against the firm for the recovery of his wages, after having acted as the manager and cashier of the partnership for five years, having had the entire control of the business, and received and paid all moneys during that time without having rendered any account to the plaintiffs, and having in his possession all the books of the partnership.

Under these circumstances, it is highly proper that an arrangement should be made for investigation and adjustment of the account; the court being careful to secure the defendant *Towns* against any unreasonable delay.

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It will be right, therefore, we think, to dissolve the injunction so far as it stays any proceedings whatever in the action at law. *Towns* should be at liberty to proceed to trial and enter up judgment, but execution should be stayed. He ought also to be at liberty, in case he should obtain judgment, or in the event of unreasonable delay on the part of the plaintiffs, to apply to the court as he may be advised. We do not think it right, however, to order any money into court. The defendant *Towns* does not swear that any thing is due to him; and the account which he has set out is perfectly consistent with his having received every thing that he could claim.

Judgment.

The costs we think it right to reserve. It may be that *Towns* has received every thing that was due to him; and it may be that his demand has not been reduced by any payments whatsoever. Until more light is thrown upon the state of the accounts, no accurate judgment can be formed as to how the costs should be disposed of. Under this arrangement, it is possible that the plaintiff may be unable to offer any effectual defence at law, although it may be that the defendant's claim has been either wholly satisfied or greatly reduced. This, however, is the fault of the plaintiffs themselves, who have chosen, instead of filing a bill for discovery, to rely upon the account, which cannot be taken until the suit reaches the master's office.

We do not follow the rule of giving *Towns* his costs to the time of notice of the amendment, because it is manifest that the amendment, in the present case, has not materially altered the position of this defendant. It consists entirely of the addition of a party; and that *Towns* did not mainly rely on this objection, is manifest from his not demurring to the bill or even raising the point by his answer; but on the contrary, obtaining an order *nisi* for dissolving the injunction, on the ground that he had fully answered the plaintiff's bill—that is, had effectually displaced the equity stated in it.

WILMOTT V. BOULTON.

1850.

Practice—Amendment—Evidence.

Letters are admissible as evidence of the case of the party producing them, though they are not mentioned in the pleadings.

The court refused to give special leave to amend by introducing new matter, where the matter of the proposed amendment could be proved under the pleadings without such amendment.

This was an appeal from the master's decision refusing the plaintiff leave to amend. The bill was for redemption, and plaintiff now desired to put in issue a letter written by the alleged mortgagee, which, it was considered, would shew that the transaction, although in form an absolute conveyance, was in fact a case of mortgage. The letter, which was set out in the affidavits filed, was dated in February, 1845, and was addressed to one *John Mather*, and was in the following words: "I received a letter from you last month desiring apparently to purchase back the land you conveyed to me for a debt of *Wilmott*. I am quite willing to let you have it again, provided your terms suit; and I would accept from you (as you drew it) lower terms than I would take of a stranger. But should you wish to do so, you must not delay, or expect me to refrain from selling should another offer take place in the meantime; for land becomes a loss instead of a profit when held too long." And in a postscript to the letter, it was stated, "If I get £75 down without further delay, I shall take it for the land, although that is less than it cost me." Statement.

Mr. *McNab*, for the plaintiff, now asked the court to grant permission to make the amendment which had been refused by the master. It is true that the fact of the existence of this letter was known long ago to the plaintiff, but from the fact of the solicitor who had formerly the conduct of the cause having absconded from the province, and the ignorance of the plaintiff as to the facts necessary for him to prove, he had not, until very recently, become aware that it would be requisite to put this letter in issue.

Mr. *J. Crickmore*, contra, objected to the leave being granted; the answers of the defendants were filed a year ago, and after evidence has been taken in the cause, he submitted the plaintiff was too late to obtain the leave asked for.

1850. THE CHANCELLOR.—This is an appeal from the master's decision, refusing the plaintiff permission to amend after replication.

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The suit is for redemption. The bill alleges that the indenture, under which the defendants claim, though in form an absolute deed, was intended merely as a security for a sum of £95, lent by the defendants' testator to the plaintiff; and the defendants having set up a release of the equity of redemption, the plaintiff has charged in his bill by way of amendment, that if such were ever executed by him, it must have been obtained by fraud. The plaintiff now wishes to amend, only for the purpose of putting in issue a letter written by the defendants' testator, in which he has admitted, or is supposed to have admitted, that his title, though apparently absolute, was in fact redeemable.

Judgment. Were I convinced of the necessity of the desired amendment, I should be very reluctant to refuse the plaintiff permission so to amend, in a case like the present, and under the circumstances detailed in the affidavits. Prior to 1828, a plaintiff in equity had an unlimited power of amendment, whether before or after answer. The commissioners, to whom the practice and proceedings of courts of equity in England had been referred in 1825, were of opinion that such unlimited power of amendment had led to serious abuses; and upon their recommendation was framed the 13th of Lord *Lyndhurst's* orders of 1828, which very much curtailed the plaintiff's rights in regard to amendment; and that order has been, in substance, introduced here.

In applying that rule to the present case, it would have been difficult (upon the supposition that this amendment is necessary) to have affirmed, on these affidavits, that the plaintiff's solicitor had not been guilty of great neglect, in not having earlier put in issue a document, the existence of which was known to him so far back as the month of February last. And yet, one could hardly have affirmed that the exclusion of such an amendment, which might have been productive of great injustice in this particular case, would have been rendered necessary by the rule in

question, or would have been in accordance with its spirit. 1850.
 Its object is to prevent improper or unnecessary delay; and in the pursuit of that object, it requires a plaintiff moving to amend, in a case like the present, to satisfy the court that the amendment could not have been sooner made with reasonable diligence. But before pronouncing the application to have been unreasonable, we must have been satisfied of something more than that the existence of this letter had been known to the plaintiff's solicitor for some time prior to the motion. Cases assume such different aspects—liable to be presented in such different lights to different minds, or to the same mind at different periods of their progress, that the importance or necessity of referring to a document, the existence of which is known, may not always be perceived. To hold a plaintiff then always concluded, in relation to this matter of amendment, by neglect growing out of the misapprehension of his solicitor or counsel, would be, in my opinion, to establish an unreasonable rule, unwarranted by analogy; because it is abundantly clear, that this court has at all times relieved against mere errors of examiners, commissioners, witnesses, solicitors and counsel, in all stages of a cause; (a) and to refuse such relief on an application of this kind might be productive of the grossest injustice. The rule established by Lord *Lyndhurst* is, beyond question, highly beneficial; and, in enforcing its general observance, some amount of individual hardship may at times be the necessary consequence. But the rule must be carried out in its spirit. We must be careful of refusing amendments, which, while necessary for the attainment of justice in the individual case, do not militate against the general objects of the provision. At common law, amendments are permitted at almost every stage; and here, we thought it right, by the twelfth order of May last, to authorise amendments, whenever they can be shewn to be necessary and proper for the attainment of justice—necessary for the plaintiff, and consistent with the rights of other parties, under all circumstances. That order is not to be understood indeed as conferring an

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(a) *Hood v. Pym*, 4 Sim. 101.

1850. unlimited right to amend. It is not opposed to the English order, but rather conceived in the same spirit, and to be applied upon similar principles; but it indicates clearly the anxious desire of the court to permit amendments whenever they can be consistently sanctioned.

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Upon consideration, however, I am of opinion that this motion must be refused, because unnecessary; and I have only made the foregoing remarks lest, in affirming the master's judgment, I should seem to limit, unreasonably, and therefore injuriously, the principles upon which these motions should be granted or refused. This application, as I before remarked, is made for the purpose of putting in issue a letter of the defendant's testator, which contains, or is supposed to contain, an admission of the case which the plaintiff has undertaken to establish—namely, that he has a right to redeem. And the necessity for such proceeding is referred, I presume, to the rule laid down in two comparatively early cases—*Fitzgerald v. O'Flaherty*, (a) and *Blaker v. Phepoe*, (b) which, judging from reported cases, would appear to have had the sanction not only of a very eminent judge,—the present Master of the Rolls, (c)—but also of the House of Lords. (d) But, upon a recent occasion, all those cases were cited for the purpose of excluding certain letters upon which the plaintiff relied, as containing admissions of his case, and which he claimed a right to read, although they had not been referred to in the pleadings. In delivering judgment on that case (e) Sir *James Wigram* observed, "This bill, however, expressly charges that there was an agreement for giving the bond in question, and I am perfectly clear, according to the rule Lord *Cottenham* laid down, that whatever would be evidence of an agreement at law is evidence in equity, subject to this, that if one party should keep back evidence which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it." And in a still more recent case, where the reading of letters

(a) 1 Mol. 347.

(b) 1 Mol. 358.

(c) *Graham v. Oliver*, 3 Beav. 124; *Whitly v. Martin*, 3 Beav. 226.

(d) *Austin v. Chambers*, 6 C. & F. 38. (e) *Malcolm v. Scott*, 3 Hare, 63.

was objected to, because they contained only confessions of the plaintiff's liability, and therefore could not be received, because not referred to by the record, Lord *Cottenham* was pressed to reject them upon the authority of the case in the House of Lords; but his lordship observed, in answer to that argument, (a) "In the case in the House of Lords we did not go so far as you now contend for; but merely that the admission there tendered, being a verbal one, though receivable in evidence, was not to be relied upon; because a verbal admission was so easy to be misrepresented, that the plaintiff ought not to be bound by it without having an opportunity of explaining it." He adds, that Sir *James Wigram*, in *Malcolm v. Scott*, had stated the rule upon which he had always acted; and the letters were admitted.

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Boulton.

Upon these authorities I am of opinion that the letter will be admissible, though not referred to in the bill; that the amendment is consequently unnecessary, and therefore, in the present stage of this cause, improper.

ESTEN, V. C.—This was an application by the plaintiff for leave to withdraw the replication and amend the bill. The same application was made a short time since, and the court was of opinion that it ought to have been made in the first instance to the master. This was accordingly done, and the present motion is in the nature of an appeal from the master's decision, he having refused the application. The question is governed by the order of this court, which provides, that before an application of this sort shall be granted, the court must be satisfied by affidavit that the matter of the proposed amendment could not with reasonable diligence have been sooner introduced upon the record. This is a rule laid down by the court for its own guidance, and no doubt founded on sufficient reason. It was originally established in England, and was adopted in this country. The master has been of opinion in the present case, that the requirement of this order has not been satisfied, and I see no reason to doubt the correctness of that determination. I think, therefore, that the application ought to be refused with costs.

Judgment.

(a) *McMahon v. Burchell*, 2 Phil., 132.

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PRENTISS V. BRENNAN.

Practice—Partnership.

Where it was proved that a partner had purchased a house, and a large part of the furniture thereof, with partnership funds, improperly withdrawn by him for that purpose; and such partner, being the defendant in the cause, had withdrawn all the partnership books and papers from the jurisdiction of the court, in breach of an injunction in that behalf; the court ordered the mother and sister of the defendant, and whom he had left in possession, to deliver up to the receiver, already appointed, the house and all the furniture, as partnership property.

The plaintiff moved upon notice for an order, to appoint a day for the delivery to the receiver in the cause, of the possession of the house and premises occupied by the defendant before and up to the time of his leaving Kingston, and all the furniture, books, &c.; and that the defendant and the persons in possession of the same might be ordered to deliver possession of the said house, &c., to the said receiver, within such time, &c., or that *Elizabeth Brennan* and *Eliza Brennan*, the mother and sister of the defendant, might attorn to the receiver as tenants of the house and premises, and might give security for the chattel property mentioned in the notice, &c.

Statement.

The plaintiff filed several affidavits to prove the house and its furniture were bought with partnership means.

No affidavit was filed against the motion.

Mr. *Mowat*—for the motion.

Mr. *Turner*—contra.

THE CHANCELLOR.—This motion, which asks that certain persons designated therein, upon whom notice has been duly served, may be ordered to deliver up possession to the receiver in the cause of a house and furniture, said to have been purchased with partnership funds, and occupied by the defendant up to the period of his withdrawal from the jurisdiction of this court, is based upon several affidavits now furnished, as well as upon others filed upon the motions already brought before us. It will not be necessary to specify minutely now the facts detailed in the latter affidavits, which were adverted to on the former occasions at considerable length; but before proceeding to state the effect of the further evidence, it is important to refer briefly to the proceedings which have been already

had, and to the general aspect which the case has from time to time presented. 1850.

Upon the filing of the bill, the plaintiff moved, *ex parte*, for a special injunction, restraining the defendant from removing the partnership books, and from intermeddling further in the business of the firm. The affidavits filed upon that occasion, beside laying a sufficient foundation for equitable relief, presented a strong case for the *ex parte* interference which was asked; but upon grounds already explained, we thought it safer, under all the circumstances, not to proceed *ex parte*. We gave the plaintiff permission, however, to serve a notice of motion, together with the subpoena to appear. When that motion was made, on the 4th of June last, the learned counsel for the defendant applied for time to answer the affidavits; but inasmuch as no undertaking would be given that the required terms would be complied with by the defendant during the period which he sought to postpone the motion, we thought it reasonable, under all the circumstances, that the plaintiff should be protected by an interim order; which order was served upon the defendant's agent, at the place of business, Kingston, upon the 6th of June, and upon the defendant himself upon the 8th.

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Upon the hearing of the postponed motion, on the 14th of June, the affidavits of the plaintiff presented this sort of case: they shewed a partnership entered into on the first day of April, 1843, between the plaintiff and defendant, for a period of five years; the capital, about £5,000, is advanced by the plaintiff, while the burthen of management is thrown exclusively upon the defendant. They represent access to the books and papers as having been denied to the plaintiff during the whole progress of the partnership; and the plaintiff complains that, although the business had been at various times represented to him by the defendant as being lucrative, affording a profit of about £1,000 annually, he had notwithstanding been called upon repeatedly, on recent occasions, to make further advances for the purpose of sustaining the credit of the firm; and that he had in fact so advanced a further sum, after all deductions, of

1850. £4000. An application for further information, and for permission to inspect the accounts, in that state of things, is said to have been met by a proposition on the part of the defendant, to assign to the plaintiff the entire accounts of the firm, represented as then amounting to the sum of £6500, including debts of all classes, and to relinquish to him the entire management, provided he would pay the defendant a sum of £2500, in addition to the sums already withdrawn by him. The plaintiff describes himself as utterly astonished by this proposal, amounting in effect to a proposal that he should lose his entire capital. He charges the defendant with gross fraud in relation to the funds of the firm; and affirms, upon oath, his belief of an intention on the part of the defendant to withdraw beyond the reach of the process of this court the assets of the co-partnership.

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Judgment. The case thus made by the plaintiff, was met by an affidavit of the defendant, in which he denies that he had prevented the plaintiff from having access to the books and papers. He does not affirm that the plaintiff had in fact inspected them during any part of the partnership—the contrary is admitted; but he denies that *he* had prevented such access, in a manner of which we have spoken on a former occasion. He denies that he had ever informed the plaintiff that the business was profitable. He ascribes the embarrassments of the firm to the loss of its credit, attributable to the conduct of the plaintiff in having improperly engaged in large transactions unconnected with the partnership, in which he had sustained considerable losses; and he affirms that the proposal made by him to the plaintiff was a fair one, justified by the position of affairs as evinced by the partnership books and accounts.

The particular reasons upon which we granted this motion are set forth in our judgment, but the general bearing of the case made, and the answer given to it, is as I have above described.

On the 18th of June a motion was made to commit the defendant for breach of the order of the court, in having retained the books and papers of the partnership from the place of business, contrary thereto. The application was

opposed upon an affidavit of the defendant, sworn on the 7th of June ; but was granted upon grounds already sufficiently explained.

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Other steps were taken in the cause which it is not important now to mention ; but, on the 14th of September last, an application was made on the part of the plaintiff for an order, requiring the mother and sister of the defendant to deliver to the receiver in the cause possession of the house and furniture which form the subject of the present application, upon the ground that they had been purchased with partnership funds, improperly withdrawn by the defendant for that purpose, and which, it was argued, continued, for that reason, to be partnership property, subject to the injunction and receiver already granted. That motion was supported by the answer of the defendant, which admitted, as was contended, that the house in question had been purchased with partnership funds ; as also by an affidavit of the plaintiff, who affirmed that the house and furniture had been so acquired, to the best of his belief. It was shewn that the defendant had absconded, taking with him all the books, papers and securities of the firm ; and the receiver deposed that he had obtained possession of nothing but the stock remaining in the place of business, worth at the invoice prices, only £1500.

Judgment.

Upon the argument of that motion it was contended that it would be unjust to order delivery of possession to the receiver, as against Mrs. and Miss *Brennan*, who had not been served with notice, and who, for any thing then appearing, might be the proprietors of both house and furniture. It was contended that such an order would be unjust in regard to the defendant, inasmuch as it had not been shewn that the property had not been purchased with partnership funds ; it was intimated that he had inherited property from his father, which might have been applied to that purpose ; and it was argued that, at all events, such property, although purchased with partnership funds, could not be followed in the way supposed by the plaintiff.

In refusing that application upon the grounds then explained, we gave to the plaintiff permission to make a

1850. further motion upon notice to be served upon the parties in possession as well as the defendant; and the present motion comes before us in pursuance of that leave. (a)

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The further affidavits now furnished, and which would seem to have been suggested in great part by the argument upon the former motion, go to establish that the mother and sister of the defendant, the parties in possession of this house and furniture, and against whom the present order is asked, had merely resided with the defendant and were entirely dependent upon him for support. They prove that the defendant's father, from whom it was surmised that the defendant had derived the means of purchasing this property, had died insolvent. They shew that the defendant himself, at the time he entered into this partnership, was in humble circumstances; that his style of living, during the greater part of its continuance, was, for a person in his station, extravagant, involving an expenditure of from £600 to £800 annually; and that these expenses were defrayed from the funds of the co-partnership. They establish conclusively, as was admitted by the learned counsel for the defendant, that the sum originally paid for the purchase of this property, as also the large amount afterwards expended in repairs, were partnership moneys. They shew that some portion of the furniture, as the carpets, had been supplied from the trading establishment; that others had been paid for with partnership moneys, and they afford the strongest ground for concluding that the whole had been so acquired. Lastly, the plaintiff swears that this furniture has been packed up ready for removal, and that he believes the whole will be swept away unless placed in the custody of the receiver.

I have stated thus minutely the progress of this cause, and the effect of the evidence before us, not that any such minute statement seemed requisite for the purpose of evincing the moral rectitude of securing to the plaintiff some fragment of the large amount embarked by him in this concern—that is self evident; nor that it was necessary to bring to light the misconduct of the defendant—that is so

monstrous that every right-minded man must turn from it with abhorrence, (indeed the learned counsel for the defendant repeatedly declared that he could not and would not attempt to justify the conduct of his client,) but rather for the purpose of testing the validity of the argument so repeatedly and strenuously urged, that the order asked by the motion—however necessary as regards the plaintiff's interest—however justifiable in a moral point of view, as regards the defendant's position and conduct—would be to stretch the jurisdiction of this court beyond its known and established limits.

The arguments adduced by the learned counsel for the defendant were based, so far as I was able to apprehend them, upon two propositions: first, that the property in question cannot be fixed upon as belonging to the partnership—the necessary legal result of these transactions being, that the defendant became debtor to the partnership to the extent of the funds withdrawn, but proprietor of the property purchased therewith; secondly, that the misconduct of the defendant, however gross, cannot properly be allowed to have any influence on the determination of this motion; because, to base our determination on such a reference, would be, it was said, to punish now for conduct which, however confessedly wrong, is past, and should not in any way affect this decision.

Unquestionably, if these positions can be maintained, this order ought not to be made; because we have no intention of stretching this jurisdiction beyond its settled limits, and because we disclaim all intention of making an order for the purpose of punishing the defendant for conduct whether past or present. If his embezzlement have subjected him to any criminal charge, that must be answered in the proper court—not here. But no authority was cited in support of either proposition; and they seem to us manifestly contradictory to both law and reason.

As to the first question, that there is no principle upon which the court can ultimately deal with this as partnership property—it is a proposition no less novel than startling, that an agent, by the tortious misapplication of the property

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of his principal, by the conversion of it into other property of whatever kind, can thereby divest the rights of his principal, and acquire an absolute interest in that which has been substituted. Such most certainly was not the law as laid down by Lord *Ellenborough*. In delivering the judgment of a court, at that time filled by very eminent judges, I find the following enunciation of the law (a):—
 “Upon a view of the authorities, and consideration of the arguments, it should seem that if property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor or those who represent him in right, any other more valid claim in respect to it than they respectively had before such change. The argument which has been advanced in favour of the plaintiff, that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authority of law.” The proposition of Lord *Ellenborough* is, in principle, sufficient for the decision of this case. The learned counsel for the defendant, however, considered the notion that this furniture could be treated as belonging to the partnership, as leading to a conclusion which seemed to him absurd, namely, that upon similar principles, every cow or horse improperly purchased by the defendant from joint funds might be treated as partnership property. No doubt that is the true result of the law as contended for by the plaintiff; but I am unable to discover any absurdity in such conclusion. If the principle can apply in any case it must apply in all. Every variety of change may be produced by the necessity, or art, or even whim of the agent; such circumstances are immaterial, and cannot affect the principle in question. But it is unnecessary to discuss this point at any length, because the same objection was urged before the Court of King’s Bench in the case to which I have just referred, and was answered by the Chief Justice

in the passage of his judgment," which nearly follows the one I have just quoted. He says: "The contention on the part of the defendant was represented by the plaintiff's counsel as pushed to what he conceived to be an extravagant length, in the defendant's counsel being obliged to contend, *that if A. is trusted by B. with money to purchase a horse for him, and he purchases a carriage with that money, that B. is entitled to the carriage.* And indeed if he be not so entitled, the case on the part of the defendant appears to be hardly sustained in argument. It makes no difference in reason or law into what other form, different from the original, the change may have been made—whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*, (a) or into other merchandise, as in *Whitcomb v. Jacob*; for the product of or substitution for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such; and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general sum of the same description." Indeed, *Whitcomb v. Jacob*, (b) cited and approved by Lord *Ellenborough*, and which he says had before received the sanction of the most eminent judges, approaches very close to the present case. There, a factor entrusted with the disposal of merchandise for his principal, sold it, received the money, and instead of paying the money to his principal, *vested the produce in other goods*, and died indebted in debts of a higher nature. It was held that those goods should be considered as the merchant's estate and not the factor's. Here the agent has chosen to purchase a house and furniture, and not another stock of merchandise; that circumstance is obviously immaterial, and cannot affect the legal result.

A case occurred before Lord *Eldon*, which, while wanting material circumstances to be found here, and upon which our judgment in a great degree proceeds, furnishes a satisfactory principle for our guidance in the present case.

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(a) Willis 400. (b) Salk 1C1.

1850. I allude to Lord *Chedworth* v. *Edwards*. (a) There, *Edwards* had acted as the general agent of Lord *Chedworth* for about 20 years. His average annual payments to his principal during that period amounted to but £1600. Lord *Chedworth* was not ignorant that the income of his estates greatly exceeded the amount paid, because during the interval he had applied to his agent to ascertain the amount at which his income should be returned, and had been informed that it might be safely returned at £6400. *Edwards*, however, had never furnished Lord *Chedworth* with any account; and at the expiration of his agency he was found indebted to him in the prodigious sum of about £90,000. Upon enquiry of Messrs. *Hoares*, *Edwards*' bankers, it was found that a large amount of stock, about £60,000, was standing in his name, which had been in part purchased with rents received by *Edwards* for Lord *Chedworth*, but transmitted by him to the Messrs. *Hoare* for his own account. The object of the motion was to obtain an *ex parte* injunction to restrain the transfer of this stock; and in the course of his judgment Lord *Eldon* observed: "The question then is, whether if this stock and money are by his wrongful act confounded with his own, there is not a fair ground to say that he, having mixed them, shall not be permitted to dispose of them until he shall have satisfactorily distinguished by an answer put in here, that which in conscience he ought never to have mixed. Upon these grounds, though the case is new, it is pregnant with so much probable evidence, that nine-tenths of this property may be the subject of a very grave question, whether it is not to be deemed to be held in trust for the plaintiff; and considering that all the mischief in granting the injunction as to the whole, arose from the wrongful act of the defendant in mixing it, that I do less mischief by fixing the injunction upon the whole till he informs me what is his master's, than by not fixing the injunction upon any part, giving him an opportunity of doing the enormous injustice, of which, from the affidavits, he appears capable." It is obvious that some of the difficulties with which Lord *Eldon*

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had to contend do not exist in the case before us, and that there are ingredients here—upon which I shall presently observe, which did not exist in *Chedworth v. Edwards*; but the decision is in many respects a strong authority in favour of this application.

It may be argued, however, that the principles laid down in the cases to which I have referred do not apply, because here the defendant is a partner, and not an agent. But laying out of view, for a moment, the peculiar position in which the defendant was placed—to which I shall presently advert—and regarding him as an ordinary partner, it is clear, I think, that there is no force in the objection. A partner, no doubt, has a community of interest in the property of the concern, which would not belong to him as agent; but it would be a monstrous conclusion that he has therefore power to convert the partnership effects to his own use. Every partner is an agent of the partnership; his powers and obligations, his rights and duties, are, in many respects, governed by the same rules as those of an agent. A very eminent jurist (*Pothier*) has classed partnership as a species of agency—" *Contractus societatis non secus ac contractus mandati*," is his language. As a general principle, each partner is constituted the agent of the partnership for the purpose of entering into all contracts within the scope of the partnership concern; but it would be a most unwarranted inference that he has any right to convert the partnership stock to his individual advantage. The authority which he derives from his position, is an authority to dispose of the stock in the augmentation of the trade, and for the mutual benefit of all concerned, not a power to apply it, or any portion of it, to his individual purposes. And as all property which has been substituted for that of the principal, no matter how changed in form, is regarded as clothed with a trust in favour of such principal, so long as the substitution can be established: in like manner, whatever is acquired by an individual partner by means of an unauthorised disposition of any portion of the partnership stock, is regarded as clothed with a trust in favour of the concern, so long as the mode of acquisition can

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1850. be distinctly traced. If, then, this court would have protected the plaintiff against the misconduct of the defendant had his relation been that of an ordinary partner, with the limited powers belonging to him in that character, to the extent and upon the principle I have explained, the importance of extending the like protection against one occupying the peculiar position of this defendant is too obvious for comment.

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The question here is therefore one of fact. Has the property, possession of which is asked for by this motion, been acquired by an improper application of the stock of this co-partnership? Now it was argued that, in the determination of this question, we must exclude from our consideration the gross misconduct of the defendant in having absconded, carrying with him all the records of this co-partnership, (records compiled under his exclusive control, and with which he alone was acquainted,) and that the motion must be determined without reference to the unprecedented course which the defendant has thought proper to pursue. From that proposition I wholly dissent. Before arriving at such a conclusion, we must forget a rule of evidence, recognised by the most eminent judges, and repudiate the jurisdiction in cases of spoliation exercised by courts of equity from the earliest period.

This defendant enters into partnership with the plaintiff several years since, when he was confessedly without means. The plaintiff furnishes all the capital. The defendant claims—whether rightly or wrongly is unimportant—he claims and exercises exclusive control of the business. He alone has access to the books. After a business of some seven or eight years, and under circumstances well calculated to excite alarm, large demands are made upon the plaintiff for further advances, growing out of the embarrassment of the firm, as is alleged by the defendant. A statement of the affairs is refused; access to the books and papers denied; and in this state of ignorance a proposal is made to the plaintiff, tantamount to the loss of his entire capital. After having exhausted every means of accommodation, this bill is filed, charging the defendant with

improper and fraudulent conduct in regard to the stock of the firm; and an injunction and receiver is moved for. That motion is strenuously resisted by the defendant, upon an affidavit which, with the light at present thrown upon it, I cannot characterise as other than disingenuous in the extreme; and when the defence fails—when the injunction and receiver is ordered—he absconds, carrying with him not only great part of the assets of the firm, but all the books and accounts. The present application, to have an inconsiderable property—inconsiderable I mean as compared with the advances of the plaintiff—placed in possession of the receiver in the cause, as partnership property, is made upon affidavits which establish conclusively, as has been admitted, that a great portion of this property is the produce of an improper application of the partnership stock, and leading with great force to the same conclusion in respect to the whole. In that state of things, this defendant, while guilty of the most flagrant spoliation, stands cavilling at the plaintiff's evidence as not establishing conclusively that which can only be conclusively established through the medium of these books, which he has abstracted and withholds, in open defiance of his duty and the process of this court. This defendant, whose duty it was to have kept a faithful and clear account of all the transactions of this firm, and to have preserved that record with jealous care for the information of the plaintiff, this defendant has placed every document connected with the partnership business beyond the plaintiff's control; and while withholding the only means by which the mystery might be revealed, he thinks himself at liberty to object to the inconclusive nature of the evidence upon which the plaintiff is seeking to recover the wreck of his capital from utter destruction. Surely if ever there was a case in which the application of the maxim "*omnia presumuntur contra spoliatores*" would be proper, this is that case.

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In *Harwood v. Goodright*, (a) where it was found by a special verdict that a testator made his will and gave the premises in question to the plaintiff in error, but after-

(a) Cow. 87.

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wards made another will different from the former, but in what particular did not appear; the court decided that the devisee under the first will was entitled against the heir-at-law. But Lord *Mansfield* said, *that in case the defendant had been proved to have destroyed the last will, it would have been good ground for the jury to find a revocation.* And in an ejectment, where the lessor of the plaintiff refused to produce a deed connected with the title, and a nonsuit was the consequence, the same eminent judge observed, “The refusal to produce it was an unfair attempt to recover contrary to the real merits; and being a deliberate refusal, by the advice of counsel, contrary to the recommendation of the judge, warranted the strongest presumption that the deed would shew that neither of the lessors of the plaintiff had any title;”—and the motion to set aside the nonsuit was refused.

Judgment.

Although the maxim to which I have referred, considered as a rule of evidence, may, when pressed beyond just limits, lead to erroneous results, it is yet obviously founded on just principles of reason. And the extensive jurisdiction exercised by this court, although at times carried to a great length, further perhaps than one would be disposed to follow except upon precedent and authority, is yet firmly established, and proceeds upon the clearest principles of reason and justice. In *The King* and Lord *Hounsden* v. Countess Dowager of *Arundel*, (a) where the king and his farmer under him claimed title by the attainder of *Francis Dacres*, who was attainted of high treason, and was supposed to be tenant in tail by virtue of a deed, strongly suspected to be suppressed and withholden by some under whom the defendants claimed, it was therefore decreed that the king and his farmer under him should hold the land until the defendant should produce the deed, and the court make further order thereon. That case was decided by the then Chancellor with the assistance of the Chief Justices *Coke* and *Hobart*. And in *Hampden* v. *Hampden*, (b) where the plaintiff claimed as devisee under the defendant's father's will: by proof it appeared that there was such a

(a) Hob. 109. (b) 3 Bro. P. C. 551.

will, though no exact account was given of the contents thereof. And inasmuch as the court was satisfied that the defendant had suppressed the will, and because (though no exact proof was made of the contents) the defendant might clear that by producing the will, therefore it was decreed that the plaintiff, the devisee, should hold and enjoy until the defendant produced the will and further order. That case was decided by the Master of the Rolls, affirmed by the Lord Chancellor in appeal, and afterwards by the House of Lords.

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Many other authorities might be cited to the same effect. Enough has been adduced to mark the nature and extent of the jurisdiction; and I shall only observe, in conclusion, that whatever difficulty there may be in following some of the decisions upon the subject, (*a*) this case seems to me open to no such objection. We are not called to act upon inference, we proceed upon evidence, which, if unsatisfactory, has been rendered so by an act of spoliation well nigh unprecedented.

Judgment.

SAME CAUSE.

Practice—Warrant—Sequestration.

A warrant to the sheriff to commit a party is not irregular, though no return day be mentioned in it.

Upon the sheriff's return of *non est* to a warrant for the committal of a party, and an affidavit to the effect required by the 188th of Vice-Chancellor Jameson's orders, a sequestration will issue at once.

Quere—Whether a party, whose committal has been ordered for breach of an injunction, and against whom a writ of sequestration has been granted for the same contempt, can move against the writ before clearing his contempt.

A warrant to the sheriff of the United Counties of Lincoln, Haldimand and Welland, for the arrest of the defendant, issued on the 31st day of August, 1850, under the order for the committal of the defendant for breach of the injunction. (See ante, p. 428.)

To this warrant the sheriff had returned *non est inventus*. Upon this return and affidavits that the defendant had absconded, the plaintiff obtained an *ex parte* order for a sequestration, on the 19th day of October following.

(a) Barker v. Ray, 2 Russ. 63.

1850. Mr. *Turner* now moved to set aside this order and the sequestration issued thereon for irregularity.

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Mr. *Mowat*, for the plaintiff, objected to the defendant being heard, he being in contempt. A party in contempt may move to set aside the proceeding placing him in contempt for irregularity; that, however, is not the case here, for while the defendant, by allowing the proceedings to remain in force against him, admits that he is properly in contempt, at the same time comes to set aside subsequent process, which he submitted he could not, while standing out all process of contempt, be permitted to do.—Beame's Order, p. 35; Daniel's Chan. Pr., 554; *Wilson v. Bates*, (a) *O'Dell v. Hart*; (b) *Morrison v. Morrison*; (c) were referred to on this point.

Mr. *Turner* asked the court if he should proceed.

[*The Court*.—You had better proceed with the argument, subject to the objection: it may be, that we shall not find it necessary to consider that point.]

Argument.

The writ of sequestration is considered the highest prerogative writ issued by this court, stronger even than a writ against the person. There is, I submit, error in the process; there ought to have been an attachment issued in the first instance; the plaintiff ought then to have proceeded by attachment with proclamations, commission of rebellion, next to serjeant-at-arms, and then a sequestration; and there should have been fifteen days between the *teste* and return day in each process. He referred to and commented on *Plumbe v. Plumbe*, (d) Wyatt's Prac. Regr. 51-2, and 1 Tur. and Ven., 131.

Mr. *Mowat*, referred to the 75th, 164th and 188th orders, as warranting the practice pursued in this case.

THE CHANCELLOR.—Upon the application to discharge the writ of sequestration issued in the cause, it was objected, first, that there should have been fifteen days between the *teste* and return of the warrant to the sheriff, which preceded the writ of sequestration, and Wyatt's Practical Register, pages 51 and 52, were cited. Secondly, that, under

(a) 3 M. & C., 197 (b) 1 Moll., 422. (c) 4 Hare, 590. (d) 3 Y. & C. 622.

the orders of this court, and the English practice, it was incumbent upon the plaintiff to have obtained orders for the messenger and serjeant-at-arms, before suing out this writ. The propriety of proceeding by sequestration to enforce obedience to an injunction was not contested.

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As to the necessity for an interval of fifteen days between the *teste* and return of the warrant, the objection is not very intelligible. Not to mention the change effected by 1 Wm. IV., c. 36, it is obvious that the book which was cited applies only to the several *writs of attachment* then required. In this sort of case, where the proceeding is for breach of an injunction, no attachment issues. (a) There is nothing to which the language in the Register, or in the other books of practice, could apply, because no *writ* issues to the messenger or serjeant-at-arms. An *order* is obtained for those different officers to apprehend the party in contempt, and thereupon they obtain the Chancellor's warrant.

I am further of opinion, that the absence of orders to the messenger and serjeant-at-arms forms no ground of objection to this writ. The rules of this court upon the subject appear, it must be admitted, somewhat discrepant; but, upon the whole, I do not think that the 2nd section of the 75th rule can be confined properly to contempts for want of appearance and answer. The preamble recites, that it is expedient to abridge and simplify the course of proceedings *generally*; and the language of the section itself is unrestricted. But any difficulty there might be in adopting that construction, in consequence of the particular provision of some subsequent orders, seems to me to be removed by the 164th and 188th.

Judgment.

In England, the sheriff, the messenger, and the serjeant-at-arms, are distinct officers. The opposition formerly offered by the common-law judges to the writ of sequestration, obliged courts of equity to use great caution in its employment. Therefore, in order that the judges might be perfectly satisfied that every attempt to arrest the party in contempt had been made before having recourse to a process at once so stringent in its operation and so strenuously

(a) 3 Danl. C. P. 372, (n.) first edition.

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 opposed, orders were usually issued to the messenger and the serjeant-at-arms, after the return of the sheriff. That to the messenger was under special circumstances omitted, (b) but the writ never issued without the return of the serjeant-at-arms.

Judgment. In this country, where, since the 164th order, the duty of those different classes of officers has come to be discharged by the same person—namely, by the several sheriffs in their respective districts—the reason of the English practice altogether fails. And, the reason of the rule failing, one can perceive no good ground upon which the rule itself should be retained. Moreover, the object of the court was, as it is expressly stated, to simplify and abridge the proceedings; but one cannot perceive that either object would be attained, if the construction contended for were the true one. To have required the sheriff's return of *non est inventus*, to have been followed by a similar return from two other distinct officers, before issuing the writ of sequestration, however inexpedient a practice, was at least intelligible. But to direct two further warrants to the same officer, after his return to a regular writ, would be an unmeaning practice; besides that, it would altogether fail to abridge the proceedings, the object of the new rule.

This construction is very much favoured by the 188th order. That rule plainly contemplates that the writ of sequestration should issue upon the return of the sheriff to a writ of attachment, without the interposition of the successive warrants to him as messenger and serjeant-at-arms. Not only is this the obvious conclusion from the language used, but the court proceeds further to a minute detail of the evidence upon which, under various circumstances, the writ should issue. Had it been the intention to have preserved the orders to the messenger and serjeant-at-arms, such provisions would have been clearly improper. The writ would have been issued, as under the old practice, of course upon the return of the serjeant-at-arms. But inasmuch as the court intended to dispense with the services of these two special officers, upon whose diligence it formerly

exclusively relied, it became necessary to state the evidence which would be required before it would permit the writ of sequestration to issue.

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I am of opinion, therefore, that the motion must be discharged; but, in consequence of the uncertainty of the practice, without costs.

JAMESON, V. C., concurred.

ESTEN, V. C.—An order having been made in this case for the commitment of the defendant for breach of an injunction, the usual warrant issued to the sheriff of the Niagara District for his apprehension. That officer having made a return of *non est inventus*, a sequestration was issued on the motion of the plaintiff. The object of the present application is to discharge this sequestration for irregularity. The writ was issued after a good deal of deliberation and even hesitation. No express authority could be found for its issuing in this particular case; but it issues in other cases of contempt, upon the return of the serjeant-at-arms, and it issues in this particular case against a person having privilege of parliament on the first process. We could discover no other method of enforcing obedience to the injunction, if the defendant either absconded to avoid his apprehension, or, being apprehended, refused to obey the writ. We thought that sufficient authority from analogy existed for its issuing, and therefore issued it. Several objections were made to it upon the present occasion, but they finally seemed to resolve themselves into two: one, that the warrant should have been directed firstly to the messenger, and then to the serjeant-at-arms; the other, that fifteen days should have intervened between the *teste* and the return of the warrant. The 164th order of this court provides, that the different sheriffs in their respective counties shall perform the duties of the messenger and serjeant-at-arms. If the argument of the learned counsel for the defendant is correct, it is necessary to direct one warrant to the sheriff as messenger, and this being returned *non est inventus*, direct another warrant to the same officer as serjeant-at-arms for the same purpose and at the same expense. I do not think this could have been intended by

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1850. the order, and therefore am of opinion that a warrant, having
 been directed to the sheriff as serjeant-at-arms, and his
 return of *non est inventus* having been obtained, the writ
 did not issue irregularly in this respect. For the position,
 that fifteen days must intervene between the *teste* and
 return of the warrant, we were referred to Wyatt's Practical
 Register, but upon turning to the passage quoted, we found
 that it referred to several writs of attachment, and was no
 authority whatever for the purpose for which it was cited.
 I have seen no reason to alter the opinion which we formed
 upon the application for this writ, as to the propriety of
 issuing it, and am of opinion that no sufficient ground has
 been shewn on the present occasion for discharging it. I
 therefore think that this motion must be refused with costs.
 It is unnecessary to express any opinion as to whether or
 Judgment. not the defendant, being in contempt, is in a situation to
 make this application.

WALKER V. CITY OF TORONTO.

Practice—Injunction.

Where to an action on a bond for the rents of certain market dues and fees, fraud, &c., were pleaded, and upon the trial a verdict passed against the defendants, who after execution had been issued, filed a bill in this court for the purpose of having the bond declared void, on the ground of fraud, &c., and for an injunction restraining proceedings on the execution; to this bill the defendants in equity put in an answer denying the allegations of fraud, whereupon the plaintiffs amended their bill, introducing further charges of fraud, filed affidavits verifying these further charges, and moved for the injunction prayed by their bill; the motion was refused with costs.

This was a bill filed by *James Walker* and his sureties, to set aside a lease accepted by him from the defendants, of the fees, rents of stalls, &c., of the old and new markets in the City of Toronto, sold by the defendants at public auction, and of which *Walker* had been declared the purchaser. In the course of the proceedings it appeared that the defendants had advertised the fees, &c., for sale, and as a guide to intending bidders at the auction, had published a statement shewing the aggregate amounts of such fees, as also the expenditure in the collection of them during the years 1843-4-5 and 6, also a statement for the year 1847, of the amounts received, which was to the following effect:—

Statement of market fees collected and paid in by Messrs. Harrison and Dempsey for old and new markets, weigh-house, &c., from the 1st day of February, 1847, to the 5th day of February, 1848.

1850.

Received from Mr. Harrison,

For market fees.....	£528	1	3
For stalls under archways.....	195	0	0
	—————	£723	1 3

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Received from Mr. Dempsey,

For weigh-house fees.....	£253	9	4
For new market	£67	18	6
For stalls under archways	135	16	11½
	—————	203	15 5½
For fish-market		23	9 9
	—————	480	14 6½
		£1203	15 9½

It appeared that *Walker* had continued to collect the fees during the entire period for which he had become lessee thereof, and continued for some time paying the stipulated rent; that a considerable amount of rent being in arrear, the corporation brought an action at law against *Walker* and his sureties, upon the bond executed by them for securing the rent, to which the parties pleaded fraud, &c., and a verdict having been rendered against *Walker* and his sureties in that action, upon which judgment had been entered and execution issued, they now by their bill prayed that the lease and bond might be declared to have been obtained from the plaintiffs by a false and untrue representation and fraud; that an account might be taken of what money *Walker* had received under the lease, and that the corporation might be restrained from further proceedings on the said judgment, and for further relief.

Statement.

This statement of the case, together with that given in the judgment of the court, it is considered, will be sufficient fully to comprehend the points involved in the present decision.

The defendants having refrained from answering the amended bill, the plaintiffs moved, upon notice, for a special injunction; in opposition to which the defendants filed numerous affidavits, denying all fraud or concealment in effecting the lease. However, as the judgment of the court was given without any reference to the contents of these affidavits, it is considered unnecessary further to notice them.

1850. Mr. *Vankoughnet* and Mr. *Turner* for the plaintiffs.

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H. J. Boulton, Q. C., and Mr. *J. Crickmore* for the defendants.

The counsel for the plaintiffs cited the provincial statute 4 Wm. IV., ch. 23, secs. 20-1-2; 2 *Cook's Institute*, 220; *Peters v. London Board of Police*; (a) *Cornfoot v. Fowke*; (b) *Evans v. Collins*; (c) *Moens et al. v. Heyworth, et al.*; (d) *Taylor v. Ashton et al.*; (e) *Barley v. Walford*; (f) *The Mayor, &c., of Northampton v. Ward*. (g) The points mainly relied on by counsel are stated in the judgment.

THE CHANCELLOR.—In the view which I take of this case, it will be unnecessary for me to consider many of the arguments addressed to us—some of them calling into question the whole ground of equity upon which the suit has been instituted, and others involving points of practice of considerable importance; because it seems to me perfectly obvious that the court cannot with propriety interfere, under the circumstances of this case, to restrain the defendants from proceeding upon their judgment.

On the 1st July, 1848, one of the plaintiffs (*James Walker*) became the lessee, for one year from that date, of the market fees, stallage and other matters connected with two of the markets of the city of Toronto. His co-plaintiffs (*Thompson* and *Bernard*) became bound with him, as his sureties, to the city of Toronto, the lessors, for the stipulated rent, which was payable by monthly instalments. The bill represents *Walker* as having become aware, shortly after the commencement of his lease, of certain facts, upon which he now relies as sufficient to avoid his contract with the defendants. It appears, nevertheless, that he continued to make payments from time to time on account of rent. This is alleged to have been done under protest; but, in the month of March, 1849, the defendants commenced an action against *Walker* and his sureties for the recovery of rent then in arrear. The plaintiffs here (the defendants at law) pleaded, in answer to that action, that the corporation had been guilty of fraud and misrepresentation in relation

(a) 2 U.C. Q.B. 543. (b) 6 M. & W. 358. (c) 5 Q.B. 804. (d) 10 M. & W. 147.
(e) 11 M. & W. 401. (f) 9 Q.B. 197. (g) 1 Wilson, 107.

to the lease in question, sufficient to avoid the contract. The cause was tried in October, 1849, when a verdict was rendered for the plaintiffs, (thus negating the alleged fraud and misrepresentation,) and judgment was entered thereupon in November following, and execution sued out and placed in the hands of the sheriff of the county of York. The bill in this case was filed on the 14th of January, 1850, and amended on the 28th of February following. The answer of the defendants came in on the 28th day of March. The bill was re-amended on the 16th of May, not requiring any further answer, and this motion now comes on upon the answer and affidavits verifying the truth of the amendments. No explanation has been offered to account for the delay which has arisen.

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Now, without reference to the nature of the defence in the action at law, and without considering the course which the proceedings here have taken, it would, in my opinion, be extremely difficult for the plaintiffs to sustain this application, under such circumstances. When the court interferes specially by interlocutory injunction to restrain proceedings at law, after judgment, it stands in a position of great delicacy, because it is confessedly restraining an established legal right, before it has itself had an opportunity of finally considering and determining the equity opposed to it; and it does so solely for the purpose of affording the plaintiff here a reasonable opportunity of establishing the equitable case which he asserts. It is perfectly obvious then, that the plaintiffs here must establish two propositions, to justify the exercise of this jurisdiction. They must establish, first, that there is a fair case for discussion, a reasonable ground to conclude that they will be able to make out their equitable case; and they must establish, secondly, that the exercise of this jurisdiction upon interlocutory motion is, under all the circumstances of the case, necessary for the purpose of allowing them a reasonable opportunity of asserting and proving their equitable case. Now I take the latter of these propositions to be as essential as the former; because, however great the probability of eventual success may *appear* to be, the court has not before it, upon such an application, the

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materials upon which it may be called to pronounce a final decision. Its interference at such a stage with an established legal right is only for the purpose of allowing the plaintiffs that reasonable opportunity of establishing their probable case, of which, under existing circumstances, they have been deprived; and is only justifiable when it can be shewn to be necessary for the purpose of affording such reasonable opportunity. Were this court, therefore, to interfere specially for the purpose of restraining an execution at law, where the defendant—having had abundant opportunity of stating and proving his equitable case without such special assistance—has chosen to lie by till the eleventh hour, such an order would offend against the very principles upon which the jurisdiction proceeds and is justified. Plaintiffs who, having had abundant opportunity of bringing forward their equitable case, have, without reason, suffered such opportunities to escape, may not be thereby debarred from eventual relief, but they may thereby raise insurmountable obstacles in the way of the extraordinary interlocutory interference of the court on their behalf.

These observations apply to all applications of this kind, without reference to the subject matter of the legal claim or the nature of the equitable case; and they would seem abundantly borne out by reason and upon authority. In *Rowe v. Wood*, (a) Lord *Eldon* said, “In general an injunction is never granted to stay execution, except for want of appearance or answer; the parties ought to have applied sooner, and it would be extremely mischievous to grant the writ in favour of persons who have lain by so long.” And in a recent case Lord *Cottenham* said, (b) “A party coming for an injunction is bound to come quickly upon the discovery of his rights, and without having in any manner led the opposite party to suppose his case to be different from that which he really intends to make.” In applying these principles to the case now under our consideration, it is material to consider the subject matter of the action at law,

(a) 2 Swan 234. (n)

(b) *Barker v. North Staffordshire Railway Co.*, 12 Jurist, 589.

and the occurrences both before and after the trial. Here the contract which the plaintiffs seek to avoid, is a lease of certain tolls or fees receivable in respect of two markets belonging to the defendants. It is quite obvious that the sums derivable from such a source must depend, in a great degree, on the efficiency of the collector. And it is equally plain that, the amount so received being payable in very small sums and by a great variety of persons, (all which particulars if known at all can be known to the lessee only,) it must be now extremely difficult, if not impossible, for the lessors to have any thing like an accurate account of the receipts. Upon both grounds, therefore, it was the clear duty of the plaintiff, had any ground existed for avoiding this contract, to have at once stated and acted upon such right. Here, however, the plaintiff *Walker* not only proceeds in the collection of these tolls for a period of nine months, without having taken any step to have the contract declared void; but an action having been then commenced for rent in arrear, he pleads in that action the fraud and misrepresentation which form the ground of this suit, a verdict passes against him on those issues, judgment is entered up and execution issues in the following November; and yet this bill is only filed on the 14th January, 1850, six months after the expiration of the lease, and two months after execution issued. Now I do not mean to assert that it would have been impossible for the defendants to have stated such a case in their answer as to have warranted the interference of the court even under such circumstances, no opportunity having arisen for granting the common injunction. The exercise of this jurisdiction can least of all be governed by rigid rules. But I think I may safely say that the case so admitted must have been irresistibly clear. Because, although when such a motion is made upon the equity confessed in the answer, the danger of doing injustice is greatly diminished, yet is it plain that (where the equity upon the answer is questionable) the court is, even then, called upon to act against the defendant's rights in a doubtful case before final determination? Such an interference may be at times proper and necessary, but the court

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will not so act in favour of a person who has been guilty of gross laches in bringing forward his case. Prompt procedure on the part of the plaintiff would have rendered such interference unnecessary; and having failed in that respect, it is proper that the inconvenience should be borne by the person who has inexcusably delayed the assertion of his rights. But, here the case stated by the answer not only does not contain such a clear admission of the plaintiffs' equity, but seems to me fully to meet and deny the charges of fraud and misrepresentation as they were stated in the original bill, rendering the plaintiffs' right to eventual relief extremely doubtful.

Judgment.

It is argued, however, that inasmuch as this bill was amended after answer, by introducing further charges of fraud and misrepresentation, which have not been answered, the equitable case set up by those amendments must be regarded as confessed, thus entitling the plaintiffs to an injunction, irrespective of the statements in the original bill; and in reply to the objection that the amendment was made without requiring any further answer, it was argued, that although an answer had not been required, it would have been competent for the defendants to have filed one, and, having chosen not to deny, they must now be held to have admitted those further circumstances of fraud and misrepresentation, which are in themselves sufficient to support the application. Whether an injunction granted under the circumstances of this case is to be regarded as a special injunction; and whether the defendants would be permitted to move against it upon affidavit before answer, are points which have not, so far as I am aware, been yet determined. It has been said that it was the object of the third order of 1839, to affirm the practice laid down by Lord *Eldon* in *Vipan v. Mortlock*, (a) in which case his lordship appears to have treated the injunction as special; and two text writers of eminence, Mr. *Daniel* and Mr. *Drewry*, seem to concur in opinion that the injunction issued under such circumstances should be treated as special; they consider the defendant at liberty to oppose it upon affidavits,

and entitled to shew for cause, that the facts introduced by way of amendment were within the knowledge of the plaintiff at the time he filed his bill. But it will not be necessary for us to determine this point of practice at present; because it is, I think, clear that the plaintiffs cannot avail themselves of the allegations stated in the amendments, under the circumstances of this case. All the facts thus introduced must, from their very nature, have been known to the plaintiffs at the time they filed their bill. They cannot have been ignorant whether they had or had not been deceived by the advertisement under which the tolls were exposed to sale. Now if it be true that a plaintiff coming for an interlocutory injunction must not have been guilty of unreasonable delay, it follows *a fortiori* that he cannot be permitted to bring forward his case by piece-meal, as has been done here. Can a plaintiff, who, with perfect knowledge of all the facts, comes stating half a case, be permitted to add the other half by way of amendment, after answer, and to ask the court for an interlocutory injunction upon the new case so stated? That proposition has been frequently disaffirmed by Lord *Eldon*; but the position advanced here is still more untenable. The plaintiffs having introduced a new case, without requiring a further answer, now insist that the new case so advanced must be taken as confessed, because an answer which was not required has not been filed. The language of Lord *Cottenham*, in refusing an injunction under similar circumstances, is extremely pertinent: (a) "A party having made such a claim as this, (meaning the case made by the original bill,) cannot, as I have intimated, go back from it; though he may not be absolutely bound by it, yet he may thus preclude himself from coming here for an injunction on other grounds. And again—a party having known his rights, and having had his claim in respect of them disposed of, if he then raises a new ground of equity, does not present his case in a form to entitle him to ask for the extraordinary interposition of the court. A party might thus bring out his case by portions, instead of at once stating it; and

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(a) 12 Jurist, 590.

1850. to prevent this, and from a regard to the interest of suitors in this court, I should think it right to refuse to grant an injunction to a party thus seeking it.”

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Upon these grounds, without determining the effect of the judgment at law, which may be found to oppose serious obstacles to the plaintiffs' recovery; and without deciding upon the receivability of the defendant's affidavits, which I have not perused, I am clearly of opinion that the motion must be refused with costs.

JAMESON, V. C., concurred.

Judgment.

ESTEN, V. C.—This is an application by the plaintiff for a special injunction to restrain any further proceedings at law upon the bonds in the pleadings mentioned. The defendants had, in the year 1848, let the market tolls and rents by public auction to the plaintiff for one year, from the 1st of July in that year, at a certain rent, having represented in an advertisement published previously to the sale, that the market fees collected in 1847 amounted to £926 16s. 8d. The plaintiff alleges in his amended bill that he believed this sum to consist entirely of fees legally collected under a by-law of the corporation, then and still in force—whereas it was, in fact, composed partly of rents and tolls which the corporation had no right to collect; that they were aware of this fact, and fraudulently concealed it from the plaintiff, who was induced to enter into the contract by such fraudulent misrepresentation. The motion is made upon an affidavit verifying the amendments. The original bill has been answered, but not the amendments, to which no answer was required. A number of affidavits have been produced by the defendants in opposition to this application. The claim to the injunction is based upon three grounds: 1st—the misrepresentation with respect to the £926 16s. 8d., not including rents. 2nd—the illegality of the tolls comprised in it, the suppression of which is represented as a fraud on the part of the defendants. 3rd—the constructive fraud, misrepresentation, or mistake arising from the alleged illegality of all the tolls which composed the subject of the sale in question. The first ground may be summarily dismissed. I have not the

schedule containing a copy of the advertisement which has been referred to before me; but from my recollection of its terms, I should say that if the plaintiff really supposed that the £926 16s. 8d. did not include rents, it was his own fault, and that he deceived himself, and was not deceived by the corporation; independently of which, this material fact, which existed and was known equally at the time of exhibiting the original as the amended bill, is entirely suppressed in the original bill. How then can we attach any credit to the affidavit stating that the plaintiff became the purchaser of the tolls and rents on the supposition that the £926 16s. 8d. did not include rents at all, but consisted wholly of fees? But the plaintiff contends that he supposed the sum of £926 16s. 8d. to be composed entirely of legal fees, whereas many or all of them were illegal, and this fact was fraudulently concealed from him by the defendants. The fees in question might be illegal for two reasons—namely, either that they were not authorised by the by-law, or that the defendants had no right to inflict them. With respect to the latter point, it is quite clear that the defendants had actually collected all the tolls inflicted by the by-law up to the time of the sale to the plaintiff, and it is not pretended that any judicial determination had taken place previously to such sale, establishing the invalidity of any of these tolls. We must presume, therefore, that the defendants imposed and collected and disposed of these tolls in the belief that they had authority to impose and collect them; and as the plaintiff had the same opportunity of forming a judgment upon this point as the defendants themselves, it is impossible to impute any actual fraud to the defendants on the ground of the illegality of the by-law under which they acted. With regard to the other point—namely, that the sum of £926 16s. 8d. included tolls, which the by-law itself did not authorise; if this were the fact, and known to the defendants when they made the representation in question, it was a fraud on their part to exhibit such a statement to the public. The only difference between the original and amended bill in this respect is, that the amended bill specifies one additional

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1850. toll, not inflicted by the by-law, which, it alleges, entered into the composition of the sum of £926 16s. 8d. The answer to the original bill meets the general charges of fraud contained in it very fairly, but does not specifically negative the fact of the particular tolls in question having been included in the £926 16s. 8d. Supposing such to have been the case, we must nevertheless conclude from the tenor of the answer, that the defendants supposed themselves entitled to collect them under the by-law; or, if it be contended that they are too plainly without its scope to justify this conclusion—this argument operates both ways, and tends to shew that the defendants must have intended by their answer to negative their exaction. Upon the whole, I think we cannot impute any actual fraud to these defendants upon this record, and the case will then resolve itself into one of mistake, or that constructive fraud or misrepresentation which cannot be distinguished from it. The learned counsel for the plaintiff then contended that upon this ground, to which he seemed indeed to confine his case upon the present occasion, the plaintiff was entitled to relief. Supposing this to be the case, (and upon this point I express no opinion,) great difficulty must necessarily be encountered in administering the relief to which the plaintiff conceives himself entitled. The plaintiff indeed suggests that the bonds and leases should be declared void, and that he should account for the tolls and rents which he has received; but would not this be most unjust to the defendants, who may urge that had they collected the tolls and rents themselves, they would have collected far more than the plaintiff? and it is plainly impossible to ascertain the amount of any deficiency that may have occurred. The plaintiff did not abandon his purchase immediately upon the discovery of the alleged failure of it, but continued to collect the tolls and rents until the expiration of his term. When proceeded against at law he did not seek relief in this court at once, but attempted a defence to the action, which failed. Supposing him to be justified in adopting this line of conduct, on the ground that he might reasonably believe the defendants to have been guilty of fraud,

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and that it would afford a valid defence to the action ; and, moreover, that he is entitled to apply to this court for relief after his failure at law, on the ground of mistake, or what is equivalent to it ; still the mode of proceeding which he has adopted raises great difficulty in the way of granting the relief which he seeks. It appears that he has collected a great part of the tolls and rents, which he purchased, and any relief, therefore, to which he may be entitled, must be confined to the portion of them with respect to which he has been disappointed ; but it is very improbable that such very accurate accounts have been kept, or such means of information exist, as will enable the master to ascertain with any degree of precision the exact amount of the loss, which has been sustained in consequence of the facts, on account of which relief is sought by this bill. It is not, and cannot be contended that this injunction can be granted without payment into court of the whole claim, which such injunction will prevent the defendants from enforcing. As no doubt can be entertained of the responsibility of the defendants the plaintiff will suffer no inconvenience from their receipt of the money, which must otherwise be paid into court, subject to any decree that may be made at the hearing of the cause. Under these circumstances, should we be justified in restraining the defendants from proceeding to enforce their legal claim, in expectation of an account which affords so little promise of a satisfactory result ? I think that, under the circumstances of this case, the court would not be warranted in granting this injunction. The motion must, therefore, be refused, and I think with costs. I have not read the affidavits offered by the defendants, thinking it unnecessary ; nor do I wish to express any opinion as to their admissibility.

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MCDONALD V. ELDER.

Specific performance—Wild land.

Where a lot of wild land had been sold on credit in April, 1845, and by a subsequent arrangement, a conveyance and mortgage were to be executed in April, 1846 ; the parties then met, but separated without completing their arrangements in consequence of the vendor not producing his title deeds, and which he had promised to produce. No further communication passed between the parties, and in August, 1846, the vendor re-sold the

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premises for somewhat less than he was to have received from the first purchaser; gave the new purchaser a deed, and took a mortgage. In the same month, or the next, the second purchaser went into possession and made considerable improvements on the lot, and, as he asserted, with the knowledge of the first purchaser. No communication passed between the two purchasers until the month of February, 1847, when the first purchaser called on the second and told him that he meant to claim the property under his contract. In August following he filed a bill for specific performance. The cause was brought on for hearing in August, 1850, and specific performance was decreed, with costs.

Statement.

The bill in this cause was filed on the 12th of August, 1847, and stated that in April, 1845, *George Elder*, one of the defendants, pretending to be seised in fee of the premises thereafter described, (two hundred acres of wild land in the township of Brock,) contracted with the plaintiff for the sale thereof to him, at the price and upon the terms stated in the articles of agreement, and which were set forth at length in the bill; the price, &c., agreed upon were, that the plaintiff should pay to *Elder* £2 in hand, and £185 10s. was to be paid as follows: £23 immediately after the execution of the deed to plaintiff, and the balance by instalments, the last of which was to be paid in August, 1852; for securing of which, together with the interest thereon, plaintiff was to execute a mortgage on the premises so soon as the conveyance to him was executed, and which was to be completed on or before the 8th of June, 1845. The bill then alleged that plaintiff had, at the time of executing the contract, paid the sum of £2 in pursuance and part performance of the contract, and that shortly afterwards, and before the day appointed for executing the conveyance, it was mutually agreed that the further performance of the contract should be postponed till August, 1845, when a meeting by appointment took place between *Elder* and one *J. R. Thompson*, acting as the agent of the plaintiff for the purpose of carrying the contract into effect, when the agent was prepared to pay the £23, and otherwise to complete the contract. But upon investigating the title, it was found that it was vested in the father of *Elder*, then resident in Scotland, and who claimed as heir-at-law of *William Elder*, deceased, brother of the defendant *Elder*; in consequence of which *Thompson* refused to pay the money, and it was then agreed between *Elder* and *Thompson* that the payment of the £23, as also the further performance of the

contract on the part of the plaintiff, should be deferred until 1850. *Elder* could perfect his title by obtaining a conveyance from his father. That *Thompson*, accordingly, at the request of *Elder*, prepared a deed of gift from his father.

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The bill then stated that *Elder* had informed plaintiff of the receipt of his deed duly executed, and that a meeting, by appointment, had taken place between *Elder* and the plaintiff, accompanied by his agent *Thompson*, for the purpose of proceeding with the contract, when *Elder* was required to produce his deed for examination, but *Elder* refused to do so, in consequence of which the parties separated without any thing further being done, although plaintiff was desirous and willing to have the contract completed according to the terms of it. It was then alleged that shortly after this meeting, *Elder* had contracted with one *Brown*, another defendant, for the sale of the same premises at the price of £200., £37 10s. paid down, the balance without interest to be secured by mortgage; in pursuance of which, and whilst plaintiff's contract still existed, *Elder* had, by a deed dated 24th August, 1846, conveyed the premises to *Brown*, who had notice of plaintiff's claim, and who had re-conveyed them to *Elder* by way of mortgage, to secure the balance of the purchase money. Statement.

The prayer was, that the contract between *Elder* and the plaintiff might be specifically performed; plaintiff offering to pay such portion of the purchase money as was actually due, and to execute a mortgage for the residue.

The defendants, *Elder* and *Brown*, in their respective answers, admitted the execution of the contract between *Elder* and plaintiff as stated in the bill. The principal difference was their relation of the circumstances attending the meeting after the receipt by *Elder* of the deed from Scotland. The answer stated that, upon *Elder* saying that he was ready to complete the contract, and desiring to know if the plaintiff was prepared to pay the amount then due, the plaintiff refused to pay the money so due, or otherwise to fulfil his contract according to the terms thereof, insisting that the £25 which had become due according to the terms of the contract in October, 1845, should not be

1850. considered payable until October, 1846. And further, that the instalments afterwards to become due should be respectively postponed a year, to which alteration *Elder* refused to consent; whereupon the plaintiff declared the contract between himself and *Elder* void, and that he would not carry the same out unless such alteration was made in the terms of payment.

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Mr. *Thompson*, who had prepared the writings, had been examined as a witness, and in his depositions stated that he had been acting in the matter for both parties; that by his advice plaintiff had insisted upon the production of the deed to *Elder* from his father before completing the bargain. He said also that plaintiff had insisted on the postponement of the days of payment, which had led to a violent altercation between the parties; but this he considered of minor importance, and had suggested that this question should be left to some gentleman in Toronto, which was agreed to; that plaintiff "expressed no wish that the contract should be rescinded, but on the contrary he said that if the contract were broken it would cause him great loss and inconvenience. The parties left my office together." This witness further stated, that from what passed on the occasion referred to, his impression was that *Elder* desired to break off the bargain.

Statement.

It appeared from other testimony, that a messenger had been sent to Toronto to meet *Elder* with the amount of the first instalment, which he offered to pay to *Elder* if his title was such as would enable him to convey.

From the statements of other witnesses in the cause, and particularly the brother of the defendant *Brown*, it appeared that *Brown* was aware of some claim held by *McDonald* on the land; on his cross-examination this witness stated, "I do not know that my brother knew when he purchased that *McDonald* still claimed the land. *McDonald* then lived at Peterborough. I had no conversation with *McDonald* about the lot till long after my brother had purchased. It was about February, 1847. He came to my brother's house and claimed the lot, and said he was going to have a law-suit about it." It appeared that *Brown* had commenced to chop

on the land on the 31st of August, 1846, and went to reside on it that fall, and from that time until the following spring had cleared about nineteen acres and erected the frame of a house and a shanty, and that the property was now valued by some of the witnesses at £500.

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On the cause coming on for hearing,

Mr. *Turner*, for the plaintiff.—The principal objection intended to be relied upon by the other side, to the relief prayed by the bill, is the delay of which the plaintiff is said to have been guilty. He submitted, however, that there was no such delay here as would disentitle the plaintiff to the relief sought. So long as the title continued in *Elder*, plaintiff is shewn to have been anxious to have the contract completed according to the terms of it; and *Brown* purchased, having full notice that plaintiff had had a contract of sale or some bargain respecting the property; now it is clear that his duty, before entering into the bargain he had with *Elder*, was to have enquired of *McDonald* if he still claimed the property; and as it was, *McDonald*, so soon as an opportunity offered after becoming acquainted with the fact of *Brown* having purchased, went to the property and informed him of his determination to persevere in his claim. This was in February, 1847, about five months after *Brown's* purchase and before he had paid any more than £37 10s. on the land, and in the August following the bill was filed. That cannot be considered any unreasonable delay, when it is taken into consideration the distance the plaintiff resides from Toronto, the difficulty of communicating with his solicitor, and the desire he would naturally feel of having the matter settled without any recourse to law.

Argument.

Three questions, therefore, may be said to arise in this case.

1st. Whether, if a party without title contracting to sell, afterwards obtain title, equity will enforce the contract.

Mr. *Mowat*.—We concede that point.

2nd. Whether an agreement under seal can be rescinded or varied by parol; and

3rd. Whether the rights of the plaintiff are waived by laches.

1850. As to varying a contract by parol he referred to 5 *Coke* 256; *Blennerhasset v. Pierson*, (a) 2 Eq. Ca. Ab. 33, and 1 Sug. V. and P. 248.

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In *Heaphy v. Hill*, (b) the plaintiff had suffered two years to elapse before filing his bill; such delay of course could not be excused, and the bill was dismissed. Here, however, the bill was filed within one year from the time of the purchase, and although *Brown* asserts in his answer his belief that plaintiff was aware of his purchase immediately after effecting it, still the reasonable conclusion from all the facts and the evidence is, that plaintiff did not become acquainted with the fact until February, 1847, at which time he is shewn to have given *Brown* notice of his intention to press his claim. Upon the whole, he submitted, that nothing which appeared in the case was sufficient to prevent the equitable title of the plaintiff from being enforced. He referred also to *Harrington v. Wheeler*, (c) *Lloyd v. Collett*. (d)

Argument. Mr. Mowat, for defendant *Brown*, would not question the power of the court to grant the relief asked for if plaintiff should appear entitled; at the same time, it must be borne in mind that the land in question in this suit is a wild lot, and is not shewn, neither is it stated by the plaintiff, to possess any peculiar advantages. The ground for equity interfering to enforce the specific performance of contracts, is, that damages will not compensate for the loss of the bargain; that, however, cannot surely be said of land which at the time of the commencement of this litigation was in a state of nature; and in this case, if a specific performance be decreed, the amount of injury that would be inflicted on his client would be exceedingly great, and not compensated for by any particular advantage to be gained by the plaintiff, unless indeed it be in reaping the fruits of the defendant's labour and money.

The decree asked for is extremely stringent. An account of rents is sought, but no mention whatever is made of any compensation for improvements. A decree, such as that, would seem to shock the mind of any one; and he submitted that the rule of the court is, not that it will enforce every

(a) 3 Levinz. 234. (b) 2 S. & S. 29. (c) 4 Ves. 686. (d) 4 B. C. C. 469.

contract, but will do so only where it appears to be just, under all the circumstances, that it should be carried out.— 1850.

Watson v. Reid. (a) Here, however, it cannot be said that a specific performance would be just or right under all the circumstances, for two reasons: 1st. We contend plaintiff is in the position of a party who stands by and sees another making improvements on his lands without interruption; and 2ndly, plaintiff has been guilty of such laches in bringing forward his claim, and, after bringing it forward, in pressing on the suit to a determination, that he has lost all claim to the consideration of this court. *Wedgwood v. Adams*, (b) *Southcomb v. Bishop of Exeter*, (c) *Doloret v. Rothschild*, (d) *Vigers v. Pike*, (e) *Guest v. Homfray*, (f) were referred to by him on these points.

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Mr. A. McLean, for Elder, relied mainly on the delay in prosecuting his claim. So far as his client was concerned, it was a matter of very little moment whether or not a decree as asked was made. On the point of delay he referred to *Moore v. Blake*. (g) He referred to and commented on *The Marquis of Hertford v. Boore*, (h) also *Tait v. Lord Northwich*, and *Alley v. Deschamps*. (j) Judgment.

THE CHANCELLOR.—I think the plaintiff entitled to the relief he seeks. The agreement, of which the specific performance is sought, is an agreement entered into by the defendant Elder, for the sale to the plaintiff of a parcel of land in the township of Brock. This instrument bears date in the month of April, 1845, and the parties appear to have contemplated the completion of the transaction in or before the month of June following. At the date of this contract, the title to the estate is represented as standing thus: one William Elder, who had been seised in fee simple, had died intestate, about the year 1842, without issue, leaving one Henry Elder, his father, and the present defendant, his eldest brother, him surviving. These facts are not controverted; neither can it be doubted that under the circumstances the estate descended to Henry Elder, the father, and not to the defendant; but it is made a question whether

(a) 1 Russ. & M. 236. (b) 6 Beav. 605. (c) 6 Hare. 213. (d) 1 S. & S. 598.
(e) 8 Cl. & F. 651. (f) 5 Ves. 822 (g) 1 B. & B. 68. (h) 5 Ves. 720.
(i) 4 Ves. 818. (j) 13 Ves. 225.

1850. the plaintiff had been apprised of the state of the title before the execution of the contract of sale. Under existing circumstances this point seems only material in explaining to some extent the delay which has arisen. So far as it is material, Mr. *Thompson*, the gentleman who drew up the contract, swears distinctly that he had no knowledge of the state of the title until after the contract had been signed. His testimony in this, as in all other respects, seems entitled to full confidence. It is, in many important particulars, corroborated, and we must, I think, take the fact to have been as he states it. The next occasion upon which the evidence shews these parties to have been brought into communication, was in the month of August following. At that interview, it seems to have been considered by all parties that a deed from *Henry Elder* to the defendant was indispensable. Mr. *Thompson* was accordingly employed by the defendant to draft a conveyance, and the instrument so prepared was forwarded to Scotland, where *Elder* the father resided, for execution. The precise time when that deed was returned to this country does not very distinctly appear; and the statements in the pleadings, in which the delays that from time to time occurred are explained, are not consistent. For reasons which I shall presently explain, it does not seem to me material to consider further these discrepancies. The evidence clearly proves that all parties met by appointment in the township of Brock, some time during the month of April, 1846, for the express purpose of completing this purchase. What occurred at this interview has been very differently represented by these parties. The plaintiff affirms that the defendant positively refused to produce the deed from his father to himself, and that the completion of the contract became impossible in consequence of such refusal. The defendant, *Elder*, on the other hand, denies this statement, and attributes the non-completion of the purchase to the plaintiff's refusal to proceed with the matter unless he, *Elder*, would allow further time for payment of the purchase money, in proportion to the delay which had been occasioned in obtaining the deed I have just mentioned; and he further alleges that the plaintiff

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then declared that he would abandon the contract in consequence of his (*Elder's*) refusal to accede to these terms, and that the agreement was accordingly abandoned. The defendant has adduced no evidence in support of this statement. The plaintiff has examined Mr. *Thompson*, who attended on the occasion alluded to as his agent, and he states, that the defendant had not the deed from his father with him, that he declined to produce it, and that he, the witness, thereupon declared that it would be impossible to proceed further, and that the completion of the purchase became in fact impossible in consequence of such refusal. This portion of Mr. *Thompson's* evidence is corroborated by the testimony of one *McDonald*, who was present; Mr. *Thompson* also states that he had a further conversation with the defendant after the parties had separated, in the course of which he remonstrated upon the unreasonableness of the defendant's refusal to produce the deed after all that had passed; and he says that upon that occasion the defendant informed him where the deed was, and gave him reason to hope that it would be produced. This portion of Mr. *Thompson's* testimony has an important independent bearing upon the merits of the case, and also sheds a clear light upon the former part of his evidence, establishing beyond doubt, if it is to be believed, that he cannot have been mistaken as to the cause which had rendered the interview abortive. I have heard nothing which in the least shakes my confidence in the truth of this statement; and it must, I think, be taken as furnishing the true account of what occurred upon that occasion.

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In the following month of August, *Elder* sold the premises in question to the other defendant, *Brown*; he however had full notice of the prior contract, and can only be regarded as standing in the place of *Elder*. At the time of this sale, no further communication with the plaintiff had taken place; nothing had been done by *Elder* for the purpose of putting an end to the contract; and the deed had never been produced. *Brown* appears to have gone into possession in the month of August or September, and to have since made considerable improvements upon the pro-

1850. perty. Evidence has been adduced for the purpose of shewing that the plaintiff was aware of the fact of *Brown* having gone into possession, either at the time that event occurred or shortly after; and the evidence adduced has a strong tendency to shew that the fact was so. But no communication seems to have taken place between *Brown* and the plaintiff until the month of February, 1847, when notice was given to *Brown* that the plaintiff meant to rely upon his rights under the contract, and this bill was in fact filed in August following.

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Upon the hearing it was argued, either that the contract in question had been abandoned and put an end to by the plaintiff, or that he had been guilty of such laches as disentitled him to specific performance. And it was urged that the land in question, having been at the time of the sale uncultivated, ought properly to be regarded as a chattel, rather than as real estate; and that the application for specific performance being to the discretion of the court, it became proper and material to observe, that less inconvenience would result from leaving the plaintiff to his remedy at law than from the exercise of this peculiar jurisdiction.

Assuming it to be competent for us to adopt this view—assuming that under the act by which this court has been constituted, we should be at liberty to disregard the rule established by English decisions, and to treat real estate as a chattel—I confess that I have not been able to discover any thing, in the peculiar condition of real estate in this province, which would warrant the conclusion at which the learned counsel for the defendants wished us to arrive. It is true that land is transferred with us much more frequently than in England. The peculiar habits of the people of this province, the large tracts of land still unoccupied, and its consequent cheapness, all tend to this result. But I can discover nothing in such a state of things to lead my mind to the conclusion, that therefore the peculiar doctrines of courts of equity in relation to real estate are inapplicable to the condition of this country. Those equitable doctrines sprang into existence in England, because the strict technical rules of the common law, in relation to this subject, were found to operate injuriously; because it was found

expedient to authorise and enforce contracts concerning land which these rules did not sanction, and in that way to render it more subservient to the various wants of society. And in this country, where real estate is much more the subject of traffic than in England, and where it is, consequently, applied in a much greater variety of ways, and changes hands much more frequently, it is peculiarly important that its transfer should be freed, as far as possible, from the technicalities of the common-law system. If public convenience require that land, so much the subject of barter, and at the same time, comparatively speaking, of such trifling value, should be affected by contracts more pliant, less artificial, and consequently less expensive than the common-law system permits, then, it would seem to follow, that public convenience must also require an equitable jurisdiction by which such contracts may be enforced, by which frauds may be prevented and mistakes obviated; by which, on the one hand, the inartificial contract, falling short of the effect of the common-law conveyance, may be rendered effectual; and, on the other hand, the force of the common-law conveyance may be cut down to meet the object and intention of the parties. Such would seem to be the inevitable conclusion; unless indeed we are to hold the reasoning sound which would conclude that, because land is of small value, and because it enters more or less into almost every transaction, therefore contracts concerning it should be encumbered as much as possible with technical difficulties, and frauds concerning such contracts should remain altogether unredressed.

But, if this be the proper conclusion to be drawn from the cheapness of land in this province, and from the large extent to which, at the same time, it enters into almost all our dealings, the same result would seem no less clearly deducible from considering the long credit at which sales of land are for the most part made, and the extreme fluctuations in value to which it is subject. The slightest attention to these peculiarities must convince the least attentive observer, how especially important it is in this province that parties should be able to count with confidence upon the literal

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1850. fulfilment of contracts of this class; how imperfect the administration of justice would be should this court refuse to decree specific performance, leaving purchasers to their action of damages, the only remedy which the common law furnishes. The tendency of modern English authority is to enlarge this jurisdiction, and not to restrict it; so that we find it at the present day enforced in relation to species of property and classes of contracts, to which it was thought formerly not to be applicable. I can discover no reason why we should proceed in an opposite direction. One can readily perceive, indeed, that modes of procedure in their nature expensive and dilatory, must be unsuited to such a state of things. That observation, however, is applicable to all contracts. But, assuming the possibility of obviating difficulties of that class, I am of opinion that reason and authority warrant the conclusion that the peculiarities observable in the condition of real estate in this province, point clearly to the propriety of extending rather than restricting the jurisdiction of this court in relation to specific performance.

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Passing on then to the specific objections which have been urged against the plaintiff's recovery, it will be unnecessary for me to make any observation upon the first of these objections, namely, that the contract was expressly waived and abandoned by the plaintiff himself. It will have been perceived from the statement of the facts of the case, as I apprehend them, which has been already made, that in my opinion there not only is no evidence to support this allegation, but that it has been satisfactorily disproved. I am of opinion that this contract has not been put an end to or abandoned, unless indeed that is to be considered as the legal result of the delay which has been imputed to the plaintiff. In disposing of this branch of the case, the only one that admits of argument, I may first observe, that it seems to me unnecessary to consider whether time was originally of the essence of the contract, or to determine what might have been the effect of the laches attributed to the plaintiff prior to the month of April, 1846, had no subsequent dealing taken place. Because, whatever may have

been the meaning of that contract, and whatever might have been the effect of those delays, we find the parties meeting in the month of April, 1846, apparently without remonstrance on either side, for the purpose of concluding this sale under the then circumstances. It is plain, I think, that the effect of that proceeding was to put an end to those questions which the defendant now seeks to raise. Had the plaintiff filed his bill for specific performance immediately after that interview, there can be no doubt, I think, that he would have been entitled to a decree; and the only question now is, in my opinion, whether subsequent occurrences can properly have the effect of depriving him of that right.

In determining the effect which the delay imputed to the plaintiff after April, 1846, ought to have upon his right, it is proper to observe that modern decisions furnish a rule much more in accordance with reason than the rule deducible from the older authorities. The doctrine of this court, which treats a failure in the punctual observance of the terms of a contract as unimportant, where time is immaterial, is obviously founded in justice; but pushed beyond due limits, it no less obviously tends to introduce evils more formidable than those which the equity rule was intended to obviate. Therefore, even where time is not of the essence of the contract, parties have not an indefinite period within which to perform the terms of the agreement. If they desire the assistance of a court of equity, they are bound to apply promptly. (a) Parties are therefore permitted to put an end to contracts which have not been duly performed, even where time is not of their essence, by reasonable notice. But then, modern authorities by no means establish that it is competent to a party to such a contract arbitrarily to declare, at any instant, that it is determined on account of the non-observance of the stipulated time. It would be much less objectionable to hold time to be in all cases of the essence of the contract, than to adopt such a rule. In the one case, the time mutually fixed by the contracting parties would be deemed conclusive; in the

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(a) Southcomb v. Bishop of Exeter, 6 Hare 213.

1850. other, the time arbitrarily fixed by one of those parties. No such doctrine is to be found any where. The rule to be deduced from the authorities is this, that, where there has been unreasonable delay, the party injuriously affected by such delay is permitted to give notice, that unless the contract is proceeded with within a reasonable time, to be fixed by the notice, the contract will be abandoned; and, under such circumstances, this court will consider that such notice has had the effect of making time of the essence of the contract, and will dismiss a bill filed for the purpose of enforcing specific performance, if the contract has not been proceeded with according to such notice. (a) But where a party, instead of pursuing this natural and reasonable course, thinks proper arbitrarily to declare the contract at an end at any particular point of time, or to fix an unreasonably short date within which the contract must be completed, then this court treats the contract as still subsisting and exercises this jurisdiction. (b) The Vice-Chancellor *Wigram*, on a recent occasion, where the defence was that the contract had been determined by notice—not such a notice as I have pointed out as proper, but a simple notification that the party considered the contract as determined—observed, “That this cannot be done has been so repeatedly and solemnly decided, that in the simple case the answer presents I am prepared to say it is not an open question.” (c)

Judgment.

Now in the present case, I before remarked that the proceedings in April preclude all questions which might have arisen upon the antecedent delays, if indeed any laches be imputable to the plaintiff before that date, which I by no means mean to intimate. Then the evidence shews, and I think satisfactorily, that the subsequent delay is attributable to the defendant, and not to the plaintiff. It was extremely important that the plaintiff should see the deed which the defendant had obtained from his father. That deed the defendant, most unjustifiably as it seems to me, refused to produce. Mr. *Thompson* has sworn that further proceed-

(a) *Benson v. Lamb*, 9 Beav. 502.

(b) *Taylor v. Brown*, 2 Beav. 180; *King v. Wilson*, 6 Beav. 124.

(c) *Wood v. Machu*, 5 Hare, 158.

ings were rendered impossible in consequence of such refusal. It was not produced at any subsequent period; but the defendant thought proper, in the month of August following, to re-sell this estate to the other defendant (*Brown*) without any notice to the plaintiff in order to the determination of the contract, or indeed without any further communication with him of any kind. In other words, he has attempted to determine this contract at a moment arbitrarily fixed by himself without notice. That is what *Sir James Wigram* said had been often and solemnly decided could not be done, and this objection alone would be decisive against the defence; but when it is recollected besides, that this course has been pursued in a case where the plaintiff has not only been guilty of no unreasonable delay, but where the delay which has arisen is attributable to the defendant himself, it is quite clear that to hold this contract determined at the time of such sale, and in consequence thereof, would be in open violation of reason and authority.

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I am further of opinion that under the circumstances, *Brown* cannot be considered as standing in any better position than *Elder*. At the time of the sale to *Brown* the contract with the plaintiff remained unperformed in consequence of *Elder's* default. *Brown* had notice of the pre-existing contract; but notwithstanding such notice, he held no communication with the plaintiff, nor did he take any steps to determine his rights under that contract. On the other hand, the plaintiff is proved to have informed *Brown* in February, 1847, that he meant to insist on his rights; and this bill was in fact filed in the month of August following. Under those circumstances, I think the plaintiff entitled to a decree against both defendants, with costs. (a)

JAMESON, V. C., concurred.

ESTEN, V. C.—The case stated in the bill is proved, and some other material facts in favour of the plaintiff.

Confining our view to the statement in the bill, it must be admitted that *Elder*, having refused to fulfil the contract on his part in April, 1846, and the parties having then sep-

(a) Potter v. Sanders, 6 Hare 1.

1850. arated without any recision of the agreement, and *Elder* having, four months afterwards, re-sold and conveyed the land to *Brown* with notice of the plaintiff's purchase, the plaintiff was entitled to a specific performance at the time that *Brown* acquired his title.

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The matter remains in this state, according to the statement of the bill, until the commencement of the suit in August, 1847.

The only fact upon this statement would be the simple lapse of twelve months without filing a bill, which would not divest the plaintiff's equity.

Upon the actual facts of the case as disclosed by the answers and evidence, the plaintiff's title to relief seems still more clear. The facts, up to the meeting in April, 1846, are proved as alleged in the bill, and *Elder's* refusal to complete the contract, and the separation of the parties—the contract remaining open—are also proved.

Judgment. The delay between this time and the sale to *Brown* is accounted for by the understanding between the parties that a point as to the postponement of the payments was to be referred to a third party. The delay between the sale to *Brown* and the commencement of this suit, is broken by an explicit notice given in February, 1847. So far the facts appearing on the bill are in the plaintiff's favour, and strengthen his case. It appears, however, that *Brown* began to make improvements immediately upon his taking possession, and that the plaintiff was aware of this purchase soon after it occurred; but the notice above mentioned was not given for about five months afterwards, at which time nineteen acres had been underbrushed and chopped, the body of a log house had been erected and a shanty built.

If the plaintiff had a right to a specific performance in August, 1847, the mere lapse of five months without notice would not affect that right. The question therefore, is, whether this fact, coupled with the other facts in the case, is sufficient to divest the *prima facie* title of the plaintiff. I think not, for the following reasons:

The notice was given before any material expense had been incurred or damage sustained. This alone is suf-

ficient—regard being had to the circumstances that *Brown* had committed a gross fraud in purchasing the land with notice of the plaintiff's contract, and that he still claimed the land—that he made these improvements with his eyes open, and has brought this inconvenience upon himself—no encouragement or acquiescence having been shewn on the part of the plaintiff, but rather the reverse; strengthened by the considerations that the notice was given in reasonable time, the plaintiff residing at a distance, visiting that part of the country only occasionally, having to consult his legal adviser before he could determine what course to pursue, not perhaps seeing him at the time when he did visit that part of the country, some doubt arising connected with the probable expense of proceedings, which induced his legal advisers to endeavour to dissuade him from it, and the strong impression arising from the evidence of *Anne Campbell* and *Hector Brown* that the defendant *Brown* actually knew all the while he was making these improvements that the plaintiff continued to claim the lot, and proceeded, thinking that the plaintiff could not pay for the lot, and therefore that he should never be molested. It is to be considered also, that before it was prudent in the plaintiff to proceed, it was to be ascertained that *Elder* had a good title, and that *Brown* had notice. In short, supposing the plaintiff to have known of the improvements, yet giving a notice under the circumstances in five months, when so small an expense had been incurred—not more than would justly fall upon a person who had acted as *Brown* did, and not having acquiesced in the meantime, the equity is saved; but, supposing *Brown* to have known in the interim that the plaintiff claimed the lot, the case is still more clear.

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There should be a decree for the plaintiff, and with costs. The time between February and August is immaterial.

It seems to me that the purchase money, with interest, should be paid by the plaintiff to *Elder* (excepting such part of his own purchase money as has been paid by *Brown* to *Elder*, which should be refunded to him with interest, unless he prefers proceeding upon his legal remedy against

1850. *Elder*,) and that both defendants should join in conveying the property to the plaintiff.

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The case stands open as to whether the money paid by *Brown* is to be returned to him, and whether any arrangement is to be made between the defendants as to costs.

NELSON V. ROBERTSON.

Practice—Amendment—Pleading—Multifariousness—Parties.

Where a mortgage vested in the mortgagees a life estate only, and they, after default, sold the interest of the mortgagor under execution in 1836 for more than the principal, interest and costs, and the purchaser afterwards sold and his vendee went into possession, conveyed to trustees of a settlement his interest in the property, but with their assent remained in possession, and it appeared that the trustees claimed the whole estate upon the trusts of the settlement: *Held*—on demurrer by one of the trustees to a bill filed by the mortgagors against the settler and the mortgagees, together with the trustees, praying redemption, a re-conveyance by all parties and general relief—that though the plaintiffs were not entitled to what they specifically prayed, yet they were entitled, under the general prayer, to a re-conveyance of the life estate of the mortgagees, and an account of the rents and profits; and that the bill was not multifarious.

Where several tenants in common, and the husband of one of them, in order to secure a debt due by another of them, executed a mortgage which conveyed a life estate only to the mortgagee, and on default in paying the mortgage money, the mortgagee had sued and obtained judgment and execution against all the mortgagors for the amount of the debt, and under the execution so obtained had sold their reversion, and the mortgage was thereby satisfied; but the purchaser went into possession during the life of the mortgagee: *Held*—that the personal representative of the husband was a necessary party to a suit by the mortgagors for a re-conveyance of the mortgagee's life estate and an account of the rents and profits.

Where, on the argument of a demurrer, leave is given to amend the bill, and the plaintiff afterwards neglects to amend, the proper course for the defendant to take in such case, is to move that the plaintiff do amend within a given time, otherwise that the order to amend may be discharged and the demurrer allowed.

Statement.

The bill in this case, which was filed by *Charles Nelson, Catharine O'Dwyer, Maria Nelson, Hiram Nelson* and *Phæbe Slicer*, against *William Robertson, James Robertson, John A. McDonald, Benjamin Dougall, James Holmes, H. L. Routh, John Day* and *J. W. Dunscomb*, stated that the plaintiffs, being seised as tenants in common of the premises in question, did, in November, 1831, (by an indenture made between the plaintiffs and *Thomas Slicer*, deceased, of the one part, and *John McDonell*, deceased, and *James Holmes* of the other part,) in consideration of £1000 due to *McDonell* and *Holmes* by *Charles Nelson*, convey the said premises to *McDonell* and *Holmes*, their executors, administrators and assigns, subject to a proviso of redemp-

tion upon payment by the plaintiffs and *Thomas Slicer*, 1850. their heirs, &c., to *McDonell* and *Holmes*, *their executors, administrators or assigns*, of the said sum of £1000 and interest; a bond was also executed by the plaintiff and *Slicer*, securing the payment of the same sum of money; that default having been made in payment of the money, *McDonell* and *Holmes* instituted proceedings at law against the plaintiffs and *Slicer*, in which they obtained judgment and sued out execution thereon against the lands of plaintiffs and *Slicer*, under which were offered for sale the greater part of the lands so conveyed to *McDonell* and *Holmes*, at which sale one *Jacob Ford* became the purchaser for the sum of £1550, and the sheriff executed a conveyance thereof to *Ford*, who entered into possession of the lands, and two days afterwards (4th of August, 1836) conveyed the same to the defendant *William Robertson* in consideration of £1500, and that *Robertson* in 1838 married, and after his marriage he and his wife joined in a conveyance to *James Robertson*, *J. A. McDonald* and *B. Dougall*, in trust, according to the terms of, and for the purposes mentioned in articles of settlement executed previously to the marriage, and which were recited in the bill, and that the trustees entered into possession and have since continued in receipt of the rents and profits of the said lands, and that they, together with Mr. *Robertson*, had possessed themselves of the title deeds. The bill then alleged that *McDonell* and *Holmes* had become bankrupts, and that *Routh*, *Day*, and *Dunscomb* had been appointed assignees of their estate; and that thereby the premises in question became vested in them; that plaintiffs had frequently applied to the several defendants to ascertain the state of the account and to redeem, and charged combination, &c., and that sale by the sheriff was nugatory; also that the trustees and *William Robertson* had notice of the state of the title; and that the plaintiffs were entitled to redeem. The prayer was, for an account of money due on mortgage to *McDonell* and *Holmes*, and of the rents and profits, and for plaintiffs to be allowed to redeem on payment of the balance, for further relief and an injunction.

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Statement.

1850. To this bill the defendant *James Robertson* filed a demurrer, alleging as grounds therefor—

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1st. That the bill was multifarious, being filed against the defendants for several and distinct matters and causes.

2nd. That it appeared by the bill that the person in whom the interest of *Thomas Slicer*, deceased, was vested, was a necessary party, and was not a party thereto.

3rd. That the case made by the bill was not such as entitled the plaintiffs to relief in a court of equity.

4th. That the bill did not shew that the defendant was a necessary party.

Mr. *Turner* and Mr. *Strong*, for the demurrer, contended that the personal representatives of *Thomas Slicer* were necessary parties. *Slicer* being shewn to have joined in the conveyance, it must be taken that he had an interest; if so, then his representatives should be here to take the account; but even if it could be shewn that he had not any interest in the premises, still, as the bill shews that he joined in executing the bond to secure the amount due by *Nelson*, then it is proper that they should be here, as his estate is clearly liable for any deficiency. If, however, the true state of the title is not clearly made out on the pleadings, that is the fault of the plaintiffs; a plaintiff in such a case is bound to state the title of the defendants with sufficient clearness to enable the court to direct redemption.

Argument.

Egremont v. Cowell; (a) *Houghton v. Reynolds*; (b) *Lyster v. Dolland*; (c) were cited by them.

Mr. *Vankoughnet* and Mr. *Macara*, contra, submitted that there was a difference in the rule respecting the parties necessary to a suit to foreclose and one to redeem. It does not appear that *Slicer* had any title, save as husband of *Phæbe Slicer*; it is merely a question of presumption, and the court will as readily presume the one fact as the other.

Tasker v. Small (d) was referred to.

THE CHANCELLOR—The facts of the case appear to be as follow:—on the 9th of November, 1831, the plaintiffs, one of whom is the widow of *Thomas Slicer*, deceased, being seised in fee as tenants in common of, or otherwise entitled

to, the lands in question, together with *Thomas Slicer*, 1850.
demised or otherwise conveyed the same to *McDonell* and
Holmes, their executors, administrators and assigns for
ever, subject to redemption by plaintiffs and *Thomas Slicer*,
their heirs, executors or administrators.

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A bond was executed of even date by plaintiffs and
Thomas Slicer, in the penalty of £2,000, conditioned for
payment by them to *McDonell* and *Holmes* of £1,000, being
the same sum as was secured by the mortgage, and which
was in fact due to *McDonell* and *Holmes* from *Charles*
Nelson, one of the plaintiffs. Default was made in payment
of the mortgage money, and *McDonell* and *Holmes* thereby
acquired an absolute estate at law for their lives, and
being so seised, they bring an action on the bond against
the plaintiffs and *Thomas Slicer*, and in due course
of law recover judgment for the amount due, and issue
execution on the judgment against the lands of plaintiffs
and *Thomas Slicer*, under which the mortgage premises,
with the exception of one parcel, are by the sheriff sold
and conveyed in fee to *Jacob Ford*, in consideration of
£1550.

Judgment.

The whole proceedings must be presumed to be regular.

Under this deed, the reversion in fee vested in *Ford*,
excepting the one parcel not included; the equity of redemp-
tion of the whole, and the reversion of the omitted parcel,
remaining in the plaintiffs. The £1550 must be presumed
to have been paid properly by the purchaser to the sheriff;
the debt was therefore discharged and a surplus payable to
the plaintiffs. The estate for life remained in *McDonell* and
Holmes, who became trustees for the plaintiffs and *Thomas*
Slicer; the reversion was the only thing sold and bought.
No part of the legal or equitable interest in the estate for
life was touched by the sale; it all remained in *McDonell*
and *Holmes* and the plaintiffs and *Thomas Slicer*, and when
McDonell and *Holmes* were paid, which was out of *Ford's*
purchase-money, they became trustees for the plaintiffs and
Thomas Slicer.

Ford afterwards conveyed to *Robertson* in fee, and
thereby invested him with such estate as he had; and

1850. *Robertson* went into possession of all the premises that were sold by the sheriff.

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The same premises are then conveyed by *Robertson* and his wife to trustees—namely, *James Robertson*, *John A. McDonald* and *Benjamin Dougal*—in trust, and to and for the ends and intents and purposes in the said indenture particularly mentioned. This deed passed only an estate for life of *William Robertson*. It recites articles previous to the marriage, and was probably executed in pursuance of them, and *William Robertson* may be a trustee of the inheritance, but the legal estate remains vested in him. Immediately upon or soon after the execution of this deed, *James Robertson*, *John A. McDonald* and *Benjamin Dougal* entered into possession of the premises sold by the sheriff. They have been in possession ever since; and they and *William Robertson* have the title deeds.

Judgment. In 1840, *McDonell* and *Holmes* become bankrupt. *Routh*, *Dunscomb* and *Day* are chosen assignees, and an assignment of the estate and effects of the bankrupts is made to them, whereby it is suggested that the legal estate in the mortgaged premises has become vested in them.

This, as appears to us, is a mistake; the bankrupts were mere trustees, and a bare trust estate did not pass. The legal estate remains in *Holmes*, who survived his partner. It is not material; but seems to shew that *McDonell* and *Holmes* could not have conveyed to *Ford*, as it amounts to an allegation that the legal estate was vested in them in 1840.

We think the intendment on the bill is, that *Robertson* entered into possession with the consent of *McDonell* and *Holmes*, consequently no estate was thereby divested.

The result is, that the estate for life is vested in *Holmes*, who is a trustee for the plaintiffs; the reversion of the omitted parcel is in the plaintiffs, and the reversion of *Phæbe Slicer's* share of all the mortgaged premises is in her, by operation of law; the reversion of the remainder of the mortgaged premises is in the trustees of *William Robertson's* marriage settlement. The plaintiffs apply to the defendants for an account, on the footing of the mortgage to which they treat them or some of them as entitled.

All the defendants allege that *Ford*, having purchased the premises under an execution against the plaintiffs and *Thomas Slicer*, became the absolute owner, free from all equity of redemption whatever.

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The prayer is for an account and redemption in the ordinary way, and that defendants may re-convey to plaintiffs and their heirs.

The plaintiffs are not entitled to what they ask, but we think can obtain what they are entitled to under the prayer for general relief. This is an account of the rents and profits, a conveyance of the life estate, and a delivery of the title deeds.

We think the intendment on the record, as it stands, is, that *James Robertson*, *J. A. McDonald* and *Benjamin Dougall* claim the whole estate upon the trusts of the settlement. They are, therefore, properly joined with *Holmes*, who is the trustee. *Robertson* is a proper party with the others that I have named, as having received the rents and profits for part of the time under the same title, and as having the title deeds; but *Routh*, *Dunscomb*, and *Day* seem to have no interest whatever: and the bill appears to me demurrable for not joining the parties beneficially interested under the settlement. This, however, is not one of the grounds of demurrer on the record.

Judgment.

The bill is not multifarious as to *Robertson*, for it makes one indivisible case; and although he may claim no beneficial interest under the life estate, and is interested therefore, only in part of the relief prayed, he is properly joined with the others for the purpose of obtaining a complete account of the rents and profits, and a delivery of the title deeds, to the custody of which the plaintiffs, as tenants for life, are entitled.

We think the personal representatives of *Thomas Slicer* are necessary parties to the suit. Two intendments may be made upon the bill, and every intendment is to be made against the bill, which does not inform us of the time of *Thomas Slicer's* marriage or his death. If it may be presumed that the plaintiffs were legally entitled to the mortgaged premises in fee simple as tenants in common, and that

1850. *Thomas Slicer* was married at the time of the mortgage, and survived the sale, then *Phæbe Slicer's* share of the reversion passed to the purchaser and was enjoyed by him until *Thomas Slicer's* death; upon which event it reverted by operation of law—as appears to us, although it is not material—to *Phæbe Slicer*, as she could not under the circumstances make any entry. It partly, however, produced the money which discharged the mortgage; and as *Phæbe Slicer's* estate has been exonerated by other people's money, they are entitled to stand in the place of the mortgagee *quoad hoc*. It is true that if the money had been raised for the husband's benefit, he would be considered as paying it in exoneration of his wife's estate. But it was raised for the benefit of *Charles Nelson*, and therefore *Thomas Slicer* and his representatives, in common with the owners of the other shares, excepting *Charles Nelson*, who is bound to pay the whole, is entitled to be re-couped from *Phæbe Slicer's* share, a proportionate part of what that share ought to answer. In fact, the life estate should be conveyed to the representatives of *Thomas Slicer* and the plaintiffs, excepting *Charles Nelson* and *Phæbe Slicer*, with the power of redemption in these two last named persons respectively. The more correct view, however, seems to be, that *Phæbe Slicer* was unmarried at the time of the execution of the mortgage and bond. In this event, the case is more clear than in the other. The shares of all the plaintiffs were then disposed of, the defendant has been paid, and *Holmes* is a trustee for the plaintiffs, although as amongst themselves, *Charles Nelson* is bound to indemnify the others. If, however, *Phæbe Slicer's* marriage had taken place at the time that *Robertson* entered into possession, (and this we are bound to intend, as the point is left in doubt by the bill,) *Thomas Slicer* was, and his representatives are, entitled to the rents of *Phæbe Slicer's* share, which became due in his lifetime. They are, therefore, necessary parties to this suit.

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It is very manifest from what we have stated, that in our opinion, an equity is shewn against *William Robertson*, and that he is shewn by the bill to have an interest in the subject and object of the suit.

The result is, that from the best consideration we have been able to give the matter, we are of opinion that the first, third and last grounds of demurrer must be overruled, and the second allowed; and that no costs should be awarded to either party.

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On the 15th of October, Mr. *Strong*, for the defendant *James Robertson*, moved upon notice that the plaintiffs might be ordered to amend within a week, or in default that the bill should stand dismissed. The registrar's certificate shewed that no amendment had been yet made in the plaintiff's bill. *Emerson v. Emerson* (a) was cited by him as an authority for the present motion.

Mr. *Turner* asked that the time might be extended to three weeks, within which the amendment must be made.

THE CHANCELLOR.—In this case, the court having thought that a demurrer for want of parties ought to be allowed, made no order as to the demurrer, but gave the plaintiffs liberty to amend by adding parties. The present application is that the plaintiffs may amend within a limited time, otherwise that the bill should be dismissed with costs, for want of prosecution. For this course the case of *Emerson v. Emerson* was cited. There, the hearing of the cause having been adjourned, with liberty to the plaintiff to amend by adding parties, and no amendment having been made, a motion was made generally to dismiss the bill for want of prosecution, which was refused; thereupon another motion was made, that the plaintiff might amend within a given time, otherwise that the bill should be dismissed for want of prosecution, which was granted; but no order was made as to costs. There, the defendant was in a situation to move to dismiss the bill for want of prosecution under the circumstances; for by the orders of 1845, if a plaintiff did not set down his cause to be heard within four weeks after the passing of publication, the bill was liable to be dismissed. Here, the defendant seeks to dismiss the bill for want of prosecution before answer, which seems not warranted by the practice. We think the

Judgment.

(a) 18 L. J. N. S. Ch. 50; S. C. 6 Hare 442.

1850. motion should be, that the plaintiffs may amend within a given time, otherwise that the order to amend may be discharged and the demurrer allowed. Such an order may be made upon this motion, but it must be without costs.

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COUNTER V. WYLDE.

Practice—Mortgage—Partnership.

Where a mortgage was made to secure a partnership debt, a final order of foreclosure was granted, although one of the co-partners had not executed the power of attorney to receive the mortgage money, or made affidavit of non-payment—it appearing that such partner was, and had been for some time, resident out of the country, and had never interfered in the mortgage transaction in any way.

Statement.

The mortgage, for the foreclosure of which the bill in this case was filed, had been given by the defendant to one of the plaintiffs, in trust for himself and two other persons, (co-plaintiffs,) co-partners in trade, and for a debt due to the partnership. After the master had made his report, a power of attorney was executed by two of the partners, authorising the receipt, by an agent, of the money found due. An affidavit was now produced from such agent, and the partners by whom the power of attorney was executed, stating the fact of the attendance of the agent and the non-payment of the money to the agent or to either of the two partners. It also appeared that the third partner was, and had been for some time, resident abroad, and had not meddled in this transaction at any time.

Mr. *Mowat*, for the plaintiffs, on a previous day, had asked for the final order of foreclosure; and it having been objected by the court that one of the plaintiffs had not joined in executing the power of attorney, or in making an affidavit of non-payment, now renewed his motion, and submitted, on the authority of *Sudell v. Lewis*—referred to in 1st Smith's Chancery Practice, 540—that the power of attorney given, and the affidavits in this case were sufficient. There cannot be any doubt that one partner may authorise an agent to receive the funds of the co-partnership, and the payment to the agent so constituted will be good. It is true one partner cannot bind his co-partners by any instrument requiring to be under seal, but here is a mere authority

to receive money, which would be perfectly good if not under seal; and the fact that the partners had unnecessarily given an authority under seal, could not by any possibility vitiate it.

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THE CHANCELLOR.—We at first doubted the propriety of granting the motion in the absence of an affidavit from the remaining partner; but considering that one partner may receive and release a debt due to the firm, notwithstanding that the partners may have jointly appointed an agent for that purpose; (a) or that the deed may have provided that a particular partner only should be entitled to receive the debts; (b) and considering that a partner may appoint an agent for the firm, at least in matters within the scope of the business; (c) and referring to the decisions which determined that one partner could make the affidavit of debt, execute the bond, and sign the certificate in bankruptcy, under statutes appearing to exclude such power, (d) we think that we cannot be considered as either endangering the defendant's rights, or infringing any principle of law, by granting the final order upon the affidavits, and under the circumstances of this case.

Judgment

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Evidence.

The admissions of one partner that a third person was jointly interested with himself and his co-partners, are no evidence against the latter to prove such joint interest.

Upon a bill against three partners by a person who claimed to be a co-partner and proved admissions made by two of the three to that effect; no relief could be granted against the two, excluding the third.

Where the evidence was not sufficiently clear to entitle the plaintiff to a decree, though it was such as rendered his equity probable, the court gave him the option of an issue, or to have his bill dismissed without costs.

Mr. *Mowat* for the plaintiff.

Dr. *Connor* and Mr. *MacDonald* for the defendants.

The facts of the case, relating to the points decided, are so fully set forth in the judgment as to render any statement of them unnecessary.

(a) *Bristow v. Taylor*, 6 M. & S. 156; (b) *King v. Smith*, 4 Car. & Payne, 108; (c) *Story on Agency*, page 42; *Story on Partnership*, page 179.

(d) *ex parte Hodkinson*, 19 Ves. 291.

1850. ESTEN,* V. C., delivered the judgment of the court.

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Judgment.

The circumstances of this case are as follow:—in the year 1842, the Board of Works advertised for tenders for the formation of a road from Brantford through Woodstock to London, and from London through a place called “the Five Stakes,” to Port Stanley, and for the construction of the bridges and culverts on those roads. The bill alleges that the complainant and the defendant *Vanbuskirk* had agreed to tender for “the said bridges and culverts,” in co-partnership, and if such tender should be accepted in whole or in part, to perform the contract thence arising in the same manner and to share equally in the profits and losses attending it. The bill also alleges that the defendants *Schram* and *Hewitt* had entered into a similar agreement respecting the “grading of the said roads”—and that thereupon it was agreed between the complainant and the defendants to pursue their original intention respectively, as regarded the tenders, and in case they should be wholly or partially accepted, to form a general co-partnership in whatsoever contracts should thence result; it then states that tenders were made accordingly by *Vanbuskirk* in his own name, but on behalf of himself and the complainant, for the bridges and culverts on the whole of both roads; and by *Schram* and *Hewitt* for the grading on the whole of both roads; that such tenders were accepted by the Board of Works, to the extent of the bridges and culverts from Woodstock to London, and the bridges from London to Port Stanley, and of the grading from London to Port Stanley; and that by consequence a partnership arose between the complainant and the defendants as to these contracts; that the works were respectively performed by the complainants and defendants; and that large sums have been received from the Board of Works. It then prays an account and a division according to the rights of the parties. The answers, which are precisely the same, do not deny a partnership *in toto*, but admit a partnership less extensive than that stated in the bill; they state that the complainant and *Vanbuskirk* had agreed to form a co-partnership with each other as to the bridges and culverts, or

* The Chancellor was concerned in the cause while at the bar.

part of them, but had not determined to what extent—and that *Schram* and *Hewitt* had likewise agreed to form a co-partnership with each other as to the grading from London to Port Stanley, and the bridges and culverts on that road, and between London and Woodstock; that *Schram* and *Hewitt* proposed to *Vanbuskirk* to enter into a co-partnership as to part of the work; that all the parties then met, and certain prices being proposed with respect to the bridges and culverts, the defendants agreed to adopt them, but the plaintiff rejected them as too low—and thereupon the plan of a general partnership, or a partnership between the plaintiff and *Vanbuskirk*, was abandoned, and the defendants agreed to form a co-partnership amongst themselves, and met and agreed upon prices for the bridges and culverts lower than those to which the plaintiff had objected; that thereupon tenders were made by *Vanbuskirk* for the bridges and culverts from Woodstock to London, and from London to Port Stanley—and by *Schram* and *Hewitt* for the grading on the same line of road; and that the tenders were accepted, respectively, to the extent mentioned in the bill. The answers then proceed to state that, after the acceptance of the tenders, the defendant *Vanbuskirk* voluntarily proposed to the complainant to join in the work, and the plaintiff assenting, it was proposed by *Vanbuskirk* to the other defendants, who consented that the complainant should be concerned to the extent of the bridges and culverts from Woodstock to London, and thence to the Five Stakes, provided he would labour on that part of the work; that the plaintiff agreed to this proposal, and thereupon a partnership arose to that extent between the plaintiff and the defendants, who continued partners amongst themselves as to the rest of the work; that the accounts of this limited co-partnership were settled, and that the complainant had received all that was due to him in respect of it, and therefore he had no ground whatever for instituting the present suit—which the defendants pray may consequently be dismissed, with costs. It is certainly a circumstance which, at first sight, appears very much against the plaintiff, that the accounts relating to that precise portion

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1850. of the work, in which the defendants admit him to have been interested, were adjusted, and the plaintiff's portion paid to him. The bill states that on this occasion an account was exhibited, relating to this part of the work, which "purported to state what the plaintiff was entitled to be allowed in respect of the matters aforesaid." The answers admit that it purported to state what the plaintiff was entitled to be allowed in respect of those matters, "so far as he was interested in them;" so that, although the statement in the bill naturally imports that the plaintiff was entitled to nothing more than is mentioned in the memorandum, yet as this fact is mentioned by the plaintiff himself as being in his own favour, and as the defendants think it necessary to qualify their admission of it, as if, were it admitted without qualification, it would have been favourable to the plaintiff, I conclude that the statement in the bill was not intended or understood by the defendants themselves to convey that the plaintiff was entitled to what is mentioned in the memorandum and nothing more. The evidence consists of the tenders and contracts, and various admissions by *Vanbuskirk* and *Schram*, on the part of the plaintiff, and some not very material evidence on the part of the defendants. The admissions were offered in evidence against all the defendants, although made only by *Vanbuskirk* and *Schram*, on the principle that a partnership having been proved *aliunde* amongst these parties, the admission of one of them is evidence against the others. No doubt the principle is correct, but the question is as to the correctness of its application to the present case. The rule which enables one partner to bind the others by his acts and admissions, was established for the benefit of commerce, which requires the association of several persons for its successful prosecution, and could not be carried on with advantage if the concurrence of all the partners were requisite to the performance of any partnership act; but it is quite a distinct proposition that one member of an admitted co-partnership can, by his admission, create a new partnership, by the introduction of another member into the firm. Such a result quite passes by the object of the rule, and would render it liable to the greatest abuse.

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The case of *Cross v. Bedingfield*, (a) referred to in the 1850. argument, is not an authority for this doctrine, nor are the cases cited in it, all of which I have looked at. It was then contended that the admissions of *Vanbuskirk* and *Schram*, being binding on themselves respectively, entitled the complainant to a third of their respective shares, on the principle that they established the supposed partnership *pro tanto*; but I confess I do not see how relief of this sort can be administered upon the case stated in this bill, the object of which is, to establish a partnership amongst four; whereas the evidence in question, if it should have the effect sought to be attributed to it, would establish a partnership amongst three persons in two-thirds of the profits of three other persons. The only question is, whether a partnership did or did not exist amongst four; and no other relief can, I think, be administered to the complainant than to establish and enforce his claim as a member of that firm. The evidence on the part of the defendants, I have already said, does not appear to be very material. The strongest part of it is the evidence of *Harper*, who was clerk to *Hewitt & Schram*. He says that he never heard that the complainant was concerned in more than the work between Woodstock and the Five Stakes; that the profits of the rest of the undertaking were divided amongst the defendants; and that he kept a cash account between *Schram* and *Hewitt* and *Vanbuskirk*, the entries in which related exclusively to that part of the work in which it is contended by the defendants that the plaintiff was not interested, and were made by the sole direction of the defendants. Much stress was laid upon the fact that the plaintiff refrained from interfering authoritatively in the prosecution of the work, and was never seen at work beyond the Five Stakes. But these circumstances are far from being conclusive. The work was in fact divided into three portions—namely, the bridges and culverts as far as the Five Stakes, the remainder of the bridges, and the grading. The first part of the work—namely, the bridges and culverts to the Five Stakes—was executed by the plaintiff and *Vanbuskirk*; the second—namely, the bridges from the Five Stakes to Port Stanley—

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1850. was performed under a sub-contract, by two persons of the names of *Paul* and *Ellwood*; and the third—namely, the grading—together with some collateral contracts, by *Hewitt & Schram*, who likewise superintended the execution of the sub-contract of *Paul & Ellwood*. The bridges from the Five Stakes to Port Stanley were severed from the rest in consequence of an arrangement into which *Vanbuskirk* entered with *Paul & Munro*, in order to induce them to withdraw a tender they had made for that part of the work; which they did upon receiving a promise from *Vanbuskirk* that they should have it at an advanced price. If the complainant was not seen at work beyond the Five Stakes, neither was *Vanbuskirk*; because that part of the work was executed by *Paul & Ellwood*, (the latter of whom had succeeded *Munro* in the contract), in pursuance of the arrangement which I have mentioned. The absence of any authoritative interference on the part of the complainant may have been owing to the fact of the contract being in the name of *Vanbuskirk*. This suggestion is corroborated by a fact which appears in the evidence. *Hewitt* interfered on one occasion with the sub-contractors between the Five Stakes and Port Stanley, and on their appealing to *Vanbuskirk*, he told them to continue their work without minding what *Hewitt* had said to them, as he had no concern with it. Many of the witnesses say that they never knew that the complainant had any interest whatever in the work, which of course proves too much. The utmost effect produced by the defendant's evidence, is to excite doubt. Laying aside, then, the evidence of the plaintiff as inadmissible, and that of the defendants as not very material, we turn to the answers and the documentary evidence. The answers state, that when the complainant and the defendants met to determine the prices at which they should tender, they disagreed, and thereupon the idea of a partnership amongst the four, or between the plaintiff and *Vanbuskirk*, was abandoned, and it was determined by the defendants to form a co-partnership amongst themselves; in other words, the plaintiff was to be excluded. The answers then state, that the tenders were shortly afterwards made for the sole benefit of the

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defendants, to the entire exclusion of the complainant. 1850.

When we turn, however, to the copies of the tenders, which are agreed to be admitted as sufficient evidence of them, we find that both tenders of *Vanbuskirk*, namely, that for the bridges and culverts from Woodstock to London, and that for the bridges and culverts from London to Port Stanley, were signed by the complainant as surety. Now it might have been agreed between the plaintiff and *Vanbuskirk* when they planned their original partnership, that the tenders should be in the name of *Vanbuskirk*, and that the complainant should appear as a surety; and such was probably the case; but whether it was or not, it strikes me as altogether improbable that the complainant, after having been excluded from all share in the enterprise, should have allowed his name to be used as a surety for the exclusive benefit of the defendants; and this appears the more improbable, when we consider that while the original ground of objection on the part of the plaintiff was the lowness of the prices, these very prices were subsequently reduced by the defendants, and the prices at which *Vanbuskirk* actually tendered, were lower than those to which the complainant had already objected as being too low. This fact excites a strong presumption that the tender was for the joint benefit of the plaintiff and the others, and—as confessedly no abandonment occurred after the tender, and both tenders were made for the joint benefit of the same persons—that a partnership existed amongst the complainant and the defendants as to the entire work. This presumption is not materially weakened by the defendant's evidence, while the plaintiff's own evidence, if we are at liberty to look at it for that purpose, greatly confirms it. In the case of *Glynn v. The Bank of England*, (a) the bill was by an executor for payment of certain lost bank notes, on furnishing a sufficient indemnity. The only evidence of property was a list in the handwriting of the testator, containing the particulars of these notes. Lord *Hardwicke* inclined against the admissibility of this evidence, and supposing it to be excluded, there was no evidence at all.

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Judgment.

(a) 2 Ves. Sen. 42.

1850. He directed an issue, on the trial of which the admissibility and effect of the evidence might equally be determined. In the case of *Moons v. DeBarnales*, (a) the defendant had been allowed to take possession and dispose of certain wools, laden on board a foreign vessel, which had put into the Isle of Wight in distress. After a considerable lapse of time, three suits were instituted for an account of the proceeds of these wools, and the difficulty was to ascertain who was entitled to them. The defendant admitted himself to be a trustee, but put the plaintiffs to the proof of their title. The Master of the Rolls thought they had not succeeded in strictly and conclusively establishing their title, and directed the issues. In one case the particulars of the evidence are detailed, and are remarkable. It was proved that in 1794, the wools in question had belonged to the firm of *Matthieu Cherin*, at Verviers in Flanders. The plaintiff, who was a person of the name of *Kaison*, produced all the invoices and papers which would naturally be in the possession of the owner of the wools, and proved by the evidence of several persons, whose testimony however did not extend many years back, that he had recently carried on business under the firm of *Matthieu Cherin*, at Verviers. It was strongly contended in his favour, that this evidence was sufficient to warrant an immediate decree without an issue; but the Master of the Rolls thought otherwise, and directed an issue in this as well as in the other suits. In the case of *Burkett v. Randall*, (b) the bill alleged a contract of purchase, payment of the purchase money, possession and delivery of the title-deeds, and prayed a conveyance. The only evidence of the case stated in the bill, consisted of proof of acts of ownership and possession, redemption of land tax, &c. The answer denied the agreement. The Master of the Rolls directed an issue. Under these circumstances, and upon the authority of these cases, I think, that although the evidence in the present case is not sufficient to warrant a decree in favour of the plaintiff, it excites so strong a presumption in his favour, that it would be wrong to dismiss the bill without further investigation if he desires

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Vanbuskirk.

Judgment.

(a) 1 Russ. 301.

(b) 3 Mer. 466

it. We therefore offer him an issue. If he declines it, the bill must be dismissed, but without costs. 1850.

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PENN V. LOCKWOOD.

Practice—Mortgage—Usury—Rents.

Where the amount of money advanced on mortgage was less than the sum mentioned as the consideration money, the mortgagor is at liberty, in taking the account in the master's office, to shew the true sum advanced, with a view to reducing the amount of his liability, although he has not appeared to or answered the bill: he cannot, however, be permitted to shew that the contract was usurious.

Where a mortgagee takes possession of the mortgage premises, and evicts a tenant of the mortgagor who is willing to continue in possession and pay rent, the mortgagee will be held accountable for the rents from that time.

The facts of this case were shortly these: the defendant in 1833 made a mortgage of the premises in question to one *McDonald* for £100, but it was agreed between defendant and *McDonald's* agent that £90 only should, in reality, be advanced, partly cash, partly in goods. It appeared, however, that £6 worth of the goods had never been delivered. *McDonald* assigned to plaintiff, who took possession and turned out a tenant who had been put in possession by the mortgagor, and who desired to continue; and during the time plaintiff so kept the premises vacant, a large quantity of valuable timber had been removed.

Statement.

In 1848, the plaintiff considering it advisable to foreclose the mortgage, filed his bill for that purpose, to which the defendant neither appeared nor put in an answer; and the plaintiff having obtained a decree upon a precipe, (under the mortgage orders of 1845,) proceeded to take an account thereunder in the master's office, when, from evidence adduced on the part of the defendant, the facts above stated, and those set forth in the judgment of the court, were proved.

Upon these grounds, the defendant's solicitor, when before the master, contended that the whole transaction was void for usury; but if not void, then, that the account should be taken charging the defendant with £84 and interest, that being the sum advanced; from which amount there should be deducted the amount of rent which might have been obtained (namely £12 10s. per annum) from the time the plaintiff took possession in 1837, together with the sum of £25, at least, for waste committed or permitted by

1850. the tenant of the plaintiff while in possession. Many of the witnesses estimated the damage done at a sum greatly exceeding this amount; the defendant himself estimated it at £25 only.

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The master, however, overruled these several objections, and reported £100 and interest, but charged the plaintiff with five year's rent at £12 10s. per annum.

From this report of the master the defendant now appealed, and the appeal coming on,

Mr. *Turner*, for the defendant, urged the same objections as had been taken before the master.

Mr. *Vankoughnet*, for the plaintiff.—The defendant was not in a position to take the objection of usury before the master. If he could, a defendant who does not answer at all is in a much better position than if he had put in an answer, but had omitted to raise the objection of the illegality of the contract.

As to charging the plaintiff with rents and with the amount of timber destroyed, he contended that under the circumstances existing in this country at the time he took possession, there being no court in which he could foreclose, the plaintiff had, by ejecting the defendant's tenant, taken the only means then in his power of enforcing his claim; and no doubt the plaintiff, as every one else would have thought, considered himself the owner of the property, and that if he received no rents, or his agent permitted the property to be injured, it was his own loss; but certainly not that he would be answerable to the mortgagor.

Argument.

He referred to *Hughes v. Williams*, (a) and *Sandon v. Hooper*. (b)

THE CHANCELLOR.—The decree in this cause was drawn up by the registrar, upon the precept of the plaintiff's solicitor, under the 168th order of the court. The matter now comes before us by way of appeal from the master's report made in pursuance of that decree. The learned counsel for the defendant relied upon the following objections to the report, which had been pressed upon the master's consideration:—

1st. That the contract having been tainted with usury, the master should have reported that nothing was due thereon.

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2. That the master should have deducted a certain portion of the mortgage money, which was proved not to have been paid to the mortgagor.

3rd. That the illegal interest, or bonus, included in the deed, should have been deducted.

4th. That the mortgagee should have been charged with rent during the entire period of his occupation.

5th. That he should have been charged with the loss arising from waste committed by him during the same period, or suffered to be committed by his culpable negligence.

I am of opinion that the first objection to the report is not sustained. The order before alluded to provides that a defendant who elects not to appear, "shall be deemed to have admitted the execution of the mortgage, *and such other matters as are sufficiently alleged in the bill to entitle the plaintiff to a decree.*" Now, were we to accede to the construction contended for—were we to hold that it is competent to a defendant to raise in a master's office every defence which might have been presented by answer—that would be to determine that a defendant, who elects not to appear under those orders, is to be regarded as having admitted nothing; whereas they expressly provide that he is to be deemed to have admitted sufficient to entitle the plaintiff to a decree. Such a decree would not only fail of accomplishing the object intended by these orders, but would be obviously useless for any purpose. It would moreover be worse than useless—it would refer to the consideration of the master that which ought to be determined, and which the plaintiff is entitled to have determined, by the court; a proceeding unwarranted by either the letter or spirit of these orders, and contrary to the whole course of procedure here.

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Upon these grounds the defendant has, in my opinion, failed to establish the first objection. But upon all the others, he is, in my judgment, entitled to succeed.

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It was stated that the master refused to deduct that portion of the mortgage money which had never been received by the mortgagor, upon the ground that, by signing a deed in which £100 is admitted to be due, he had enabled the mortgagee to commit a fraud upon the assignee, *Penn*, and that consequently the truth of that admission could not properly form the subject of enquiry, after the assignment, and the learned counsel for the plaintiff contended that the defendant is concluded by the receipt in the indenture of mortgage, under his hand and seal. It is not denied that the evidence establishes that the whole mortgage money had not in fact been advanced; and there is no allegation of any actual fraud between the defendant and *McDonald*.

Judgment.

I cannot say that I entertain any doubt as to the state of the law upon this subject. Whatever may be the correct conclusion, upon abstract reasoning, I cannot regard this as any longer an open question. It has been long settled, I think, that any party who accepts an assignment of a mortgage security, without communication with the mortgagor, accepts it subject to the state of account between the mortgagor and mortgagee—subject not only to such variations as may have taken place subsequent to the original transaction, which is obvious, but subject to an account as to the sum originally advanced. *Matthews v. Wallwyn*, (a) is sufficient in principle for the decision of this case. But *Lunn v. St John*, decided by Lord *Thurlow*, and cited with approbation by Lord *Rosslyn* in *Matthews v. Wallwyn*, is directly in point. That case, as stated by Lord *Rosslyn*, after enquiry, was this: *Lodge* made a mortgage to *Pitman*, who, being indebted to *St. John*, made an assignment to him for a sum less in fact than the sum appearing to be due on the mortgage. *Lodge* and *Pitman* became bankrupts. The bill was filed by *Lunn*, the surviving assignee of *Lodge*, insisting that upon an account nothing would be found to have been due, or to be due, from *Lodge* or his estate. The defendant, *St. John*, insisted that the plaintiff must redeem him, inasmuch as he was a *bona fide* mortgagee, in no way connected with the state of accounts

between *Lodge* and *Pitman*. Lord *Thurlow* directed the master to enquire what was due at the time of the mortgage, what was due at the time of the assignment, and what remained due; reserving the point how far *St. John* would be affected, till after the report upon that special direction. The master reported that *Pitman* had, in point of fact, been indebted to *Lodge* in £7000; and upon that report, the assignments to *St. John* and *Muilman* (another defendant) were ordered to be delivered up for cancellation. The principle of these decisions has been approved by Lord *Eldon*; (a) and they govern the present case so clearly, as to leave no room for argument on the ground of authority. But besides authority, there are analogies leading to the same conclusion. Whatever may be the effect, at law, of the receipt usually contained in an ordinary conveyance, it is quite clear that, in this court, neither the statement in the body of the deed, nor the receipt endorsed—to which more weight is attached—is regarded as conclusive. A vendor, notwithstanding his having executed the deed, and signed a receipt, is not only permitted to shew that the purchase money was not paid, but is considered as having a lien upon the estate for the amount still due. It is true that a purchaser from the vendee, without notice, will hold discharged of the lien; but the assignee of a mortgagee, taking that which is but a security for a debt, is bound to enquire the amount of such debt before accepting the assignment, and failing to do so, his security is properly subject to the state of the account. He is not in the position of a purchaser for value without notice.

Upon these grounds, I am of opinion that the master should have ascertained the sum originally advanced to the mortgagor, and that in taking such account, he should have deducted, not only that portion of the mortgage money which had been witholden contrary to the contract, but also that which had been witholden in accordance with it, namely, the illegal bonus. I can discover no principle upon which to distinguish these sums. It is true that the defendant is not now entitled to set up the defence of usury for the pur-

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(a) *Chambers v. Goldevin*, 9 Ves. 264.

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pose of entirely defeating the plaintiff's claim; but where a plaintiff comes stating usurious transactions, it is the constant habit of this court to receive evidence of such allegations, not for the purpose of destroying the security in toto, but in cutting it down to the amount really due. I can discover no principle upon which the same course should not be pursued under present circumstances. Had the defendant set up usury by his answer, the result would have been the entire destruction of the plaintiff's claim. Although he has not done so, and is now precluded from doing so for that purpose, I can discover no ground upon which he should be prevented from proving the usurious nature of the contract for the purpose of evincing the amount really due. (a) How is this to be avoided? Is there any principle upon which this court, in taking the account, can properly order payment of a demand confessedly illegal, and which, if voluntarily paid to the plaintiff, the law would enable the defendant to recover in an action of *assumpsit*?

Judgment.

With respect to the plaintiff's liability for rent while he continued in possession of this property: it appears that the master has charged him for a period of five years, that is, till Mr. *Ross*' appointment as agent; but from the time of that appointment the master considered him as no longer chargeable. I have perused the evidence upon this point attentively, and it seems to me to establish the following facts satisfactorily, namely, that the estate was in lease at the time the plaintiff brought his ejection; that upon the execution of the writ of *habere*, sued out by the plaintiff in that action, one *Alkenbrach*, the tenant, was turned out of possession; that shortly after that event, *Alpheus McDonald* and *James McDonald* were desirous of leasing the premises, and applied for that purpose to *William McDonald*, the then agent of the plaintiff, but failed of accomplishing the object, the rent demanded by the agent—£20 per annum—being in their estimation excessive; that one *Pourrier* was placed in possession by the plaintiff about the year 1838; that, about that period, *Alkenbrach* applied to one *Blacker*, then the plaintiff's agent, for the purpose of obtain-

(a) *Scott v. Nesbit*, 2 B. C. C. 640.

ing a lease, but could obtain no answer from him on the subject; and lastly, that one *Lafontaine* applied to *Pourrier* for the same purpose, shortly after he had been let into possession, but was informed by him that the plaintiff had placed him in possession and wished him to remain there. In proof of these facts, I refer particularly to the affidavits of *Alkenbrach*, *Lafontaine*, the *McDonalds*, *Herchimer*, *Loucks* and *Spencer*. It appears from the same affidavits, that the property deteriorated rapidly after the execution of the writ of possession, not only while suffered to remain vacant, but after *Pourrier* had become the occupant. And all these witnesses, as well as several others, speak confidently of the facility with which the property might have been rented during the entire period of the plaintiff's occupation; and fix the rentable value at from £12 10s. to £15.

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Now, although great consideration is due to the plaintiff's position when this transaction took place, owing as well to the state of the law as the circumstances of the country, and although it is quite clear that the plaintiff cannot be charged with the actual value of the estate, but only for what, without his wilful default, he might have received, still I am unable to apprehend the principle upon which the master, having charged the plaintiff for the first five years of his occupation, arrived at the conclusion that he should be exempted during the remaining period. In considering the liability of a mortgagee in possession, in *Williams v. Price*, (a) Sir *John Leach* observes, "A mortgagee taking an estate by way of collateral security, is not bound to enter into possession of that estate, whether it be a security originally proceeding from his mortgagor, or a security made to his mortgagor, and by that mortgagor assigned to him. But if once he does take possession of the estate, thereby assuming the control and possession of the property thus conveyed to him by way of security, he is held to exercise the diligence of a provident owner." It is not necessary to determine whether Sir *John Leach* meant to define the liability of a mortgagee in the relation now under our consideration; nor whether his language,

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(a) Powell Mortgage, 949 (n. E. 2.)

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if such were his intention, can be made to consist with what is found elsewhere upon the subject: (a) because, assuming the Vice-Chancellor to have stated a rule too favourable for the mortgagor, and taking as our guide *Hughes v. Williams*, (b)—where certainly the law was not stated too favourably for the mortgagor—the plaintiff ought, in my opinion, to have been charged with rent during the whole period of his occupation. There, Lord *Erskine*, while limiting the liability of the mortgagee in this respect within the narrowest bounds, seems to me to have suggested the very case which has arisen here, as exemplifying the circumstances under which he would be liable. He says, “If, for instance, a mortgagee turns out a sufficient tenant.” Here a tenant was turned out of possession, whose sufficiency has not been questioned. And that circumstance weighed, I presume, with the master, because he has charged the plaintiff with rent for a period of five years. But upon what principle was that charge discontinued during the residue of the period? Assuming the agent then appointed to have used reasonable diligence to obtain a tenant, still, to hold the present plaintiff to be thereby discharged, would be, as it seems to me, to limit his responsibility to an extent warranted neither by principle nor authority. To determine that a mortgagee, acting for a series of years as this plaintiff is shewn to have done—turning out one tenant and refusing others, while the estate is suffered to become dilapidated—to determine that such a mortgagee would be relieved from a responsibility growing out of such acts by the subsequent appointment of an agent, no matter how zealous, would not be to tolerate passive indifference merely, but to sanction positive obstruction. The estate remained untenanted for several years, confessedly through his wilful default; and he has, in consequence, been charged with rent during that period. If he is to be at all exempted from rent during the remaining part of the term, it must be upon evidence that the further loss is not fairly traceable to his own misconduct. I have not been able to discover any ground upon which we can

(a) *Davy v. Barker*, 2 Atk. 2.

(b) 12 Ves. 469.

arrive at that conclusion here, and I am therefore of opinion that the plaintiff is justly chargeable with rent from the time he acquired possession. 1850.

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Lastly, with respect to the waste said to have been committed, the affidavits are certainly to some extent conflicting. But it seems to me that the evidence in support of the case made by the defendant greatly preponderates. It convinces me that a very considerable quantity of maple and cedar has been destroyed; and I see no reason to doubt that with ordinary and reasonable care this loss might have been obviated. Now it is clear, I apprehend, that a mortgagee in possession, as pledgee of the estate, is bound to take the same care of it as every prudent and cautious owner is in the habit of taking of his own property; and inasmuch as the evidence here establishes, in my opinion, that an injury has been done to the defendant's estate from the want of that care on the part of the plaintiff which he was bound to exercise, it necessarily follows that he must be charged with the loss which has been occasioned.

Judgment.

JAMESON, V. C., concurred.

ESTEN, V. C.—This was a bill for foreclosure; and the usual decree had been made. It appeared in the master's office that it had been agreed between the mortgagor and the agent of the mortgagee, that £90 should be advanced in goods and cash, and that the mortgage should be made for £100. The goods and cash were respectively paid and delivered with the exception of a bureau worth £6, and which was agreed to be accepted at that price or value, and the mortgage was executed. The mortgagee took possession in 1837, and upon that occasion dispossessed a tenant who was in possession under the mortgagor. The same individual offered to the agent of the mortgagee to rent the premises in 1838, at an annual rent of £12 3s., but his offer was refused. It was also shown that many persons were desirous of renting the place; and that a tenant could easily have been procured at a rent of £12 10s. during the whole time that elapsed after the mortgagee entered into possession, if the property had been vacant; but that in fact the mortgagee had put a person in possession of the premises

1850. in 1838, who continued to occupy them from that time without paying any rent. It was proved that during this time

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a sap-bush worth £25 was destroyed; that all the fence on one side of the property had been removed by an individual who was known; and that great waste had been committed, and to a considerable extent, by the same individual, against whom for this last proceeding an action had been commenced, which was compromised on his securing the payment of the costs. It was also shown that the fences, to the extent of three-fourths, required renewal; and that a frame of a house, which was upon the property when the mortgagee took possession, had been removed. The damage to the property from these last mentioned acts was estimated at £25. The defendants had not answered the bill, which had been taken *pro confesso* against them under the general orders of the court. The master reported £139 to be due for principal and interest on the mortgage. This report was based on the allowance of rent for five years, at the rate of £12 10s. per annum. The defendants excepted to the report, but before the exceptions were argued the new orders were issued, and under them the exceptions were abandoned, and the master's report appealed from. Upon the hearing of the appeal, the defendants contended, as they had already done by their exceptions, that the master ought to have declared the mortgage void for usury, or if not, that at all events he should have allowed only the sum actually advanced, which was £84; that rent should have been charged for the whole period; and that £25 should have been allowed for waste. The general order, under which the bill was taken *pro confesso*, provides, that under such circumstances the defendant shall be considered as confessing enough to warrant a decree of foreclosure against him; but that no particular amount shall be deemed to be admitted to be due. I am of opinion, that the defendants having failed to answer the bill, and raise the defence of usury on the pleadings, were precluded from insisting upon it in the master's office, after the bill had been taken *pro confesso* under the general order in question, and that in this respect the master's report was right. I see no reason,

Judgment.

however, why the sum due on the mortgage should not be calculated according to the amount actually advanced. The master must necessarily be authorised, in ascertaining what is due on the mortgage, to enquire what amount was originally advanced. And as to the argument, that by executing the mortgage for the full amount, the mortgagor enabled the agent of the mortgagee to commit a fraud upon his principal, by charging the mortgage to him in account for the entire sum, which seems to have been actually done, I am of opinion that it ought not to prevail. The mortgage is said to have been delivered to the agent, and to have been retained by him for some time, and then delivered to the mortgagee. It was, however, made in the name of the mortgagee, and he, by accepting it, seems to have constituted the party who received it his agent for this purpose *ab initio*. Whether, however, we regard the mortgagee as a principal receiving a mortgage through his agent, or as an assignee of the mortgagee, he appears to be equally bound by the transaction. If he is to be regarded in the light of a principal, then whatever was known to the agent was known to him; if he is to be considered as an assignee, he was bound by the state of the account between the mortgagor and mortgagee. Every person taking an assignment of a mortgage is bound to make enquiry of the mortgagor as to what is due; and it is to be presumed that if enquiry be made the truth will be disclosed, as it is for the mortgagor's benefit.

I think, also, that under the circumstances established in evidence in this case, the rent should have been charged for the whole period of the mortgagee's occupation. A mortgagee is not to be rigidly dealt with under such circumstances; but he cannot be allowed to dispossess a tenant, against whom no objection is suggested; to refuse his offer of again becoming tenant, and, while many persons are desirous of renting the premises, to put and keep a person in possession who pays no rent. It is said that it cannot be known whether, if the premises had been let, the tenant would have continued to occupy them for the whole time; but the mortgagee having, by his neglect to avail himself of

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1850. his opportunities of letting the property, made it impossible to decide that question, every presumption must be made against him. With regard to the waste, it does not appear that it was not all committed by mere trespassers; and the question arises, how far the mortgagee is to be held liable for injuries of that description, committed to the mortgaged premises after he has taken possession of them. No authority has been produced on this point, but the true rule governing in this respect seems to be that laid down by Sir *John Leach*, in one of the cases which were cited, namely, that a mortgagee in possession is to be held bound to act as a provident owner would under the same circumstances. Now the most provident owner would not be able to guard against every trespass that might be committed upon his property; and it would be unjust, therefore, to charge a mortgagee in possession to that extent. It is a question to be determined upon a just and reasonable view of the circumstances of every individual case, and in deciding which perhaps it will rarely happen that exact justice can be done. The duty of the court is to approach as nearly to what exact justice requires, as the uncertainty necessarily attendant upon such enquiries will permit. In the present instance I have little difficulty in arriving at the conclusion, that a provident owner would have prevented, or obtained satisfaction for the acts complained of, to the full amount claimed by the defendants, namely, £25, and, therefore, I think that sum at least ought to be allowed them in this respect.

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Judgment.

### EMMONS V. CROOKS.

#### *Practice—Amending—Costs.*

Where any error occurs in drawing up any of the papers in a cause, and it is necessary to have the mistake rectified, the party applying for that purpose must pay the costs of the motion.

This was an application to amend the decree drawn up in this cause after the judgment pronounced on the hearing (see ante, 159.) In drawing up the decree, the order for the plaintiff to execute the conveyance had been omitted; the solicitor for the plaintiff had served the defendant's so-

licitor with a copy of the petition to have the mistake rectified, but omitted to ask for a consent to the prayer being granted. 1850.

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Mr. *Mowat* now moved upon the petition, and referred to Perkins' edition of Daniel's Chancery Practice, 1233, and the cases there cited, to shew that the prayer of the petition ought to be granted without costs.

Mr. *Morphy*, contra, objected to the motion being granted except upon payment of costs.

[THE CHANCELLOR.—This is a motion that ought to have been consented to—why was a consent not given?]


No consent was asked—not having been asked, the defendant is entitled to appear and ask for his costs—and cited 14 L. J. N. S. 141 ch.

The other cases cited are mentioned in the judgment.

THE CHANCELLOR—We think it reasonable that the indulgence which the plaintiff finds himself obliged to ask in this case should be granted at his expense. That seems to us, as a general rule, to be highly reasonable. At law it is of almost universal application; and Mr. Daniel would seem to regard it as equally prevalent in this court. (a) In *Browne v. Lockhart*, (b) the Vice-Chancellor said, "*The advancing a cause is in the nature of an indulgence to the plaintiff, and therefore the costs of the application should be borne by him;*" thus announcing a rule as extensive as that stated by Mr. Daniel. *Hibberson v. Cooke* (c) would appear to have been a very proper one for making an exception, for there the mistake was altogether that of the registrar; yet the indulgence was granted at the expense of the party applying. But it is said that the rule should be different upon an application to amend a decree, where all parties are invited to attend for the purpose of having it correctly drawn up. It is true that all parties have notice to attend; but it is the peculiar duty of each to see that the decree contains all such provisions as he is entitled to under the judgment of the court, or the general practice. For the discharge of that duty the solicitor is paid; and failing in its performance, it would seem reasonable that any indul-

Judgment.

(a) 3 Danl. C. P. 1799. (b) 10 Sim. 420. (c) 4 Mad. 248.

1850.  **Emmons v. Crooks.** gence granted to correct such failure should be at his expense. *Askew v. Peddle* (a) was a strong case for relieving the party moving from the expense of the indulgence, for the plaintiff's former solicitor had admitted the error and promised to correct it, and sufficient ground would seem to have existed for holding the new solicitor to that undertaking. Yet, although the report is silent upon the subject, I apprehend that the indulgence was granted at the expense of the mover. Had the order been silent, the costs of the successful party would have been, I presume, costs in the cause. But that cannot have been the case; for had it been so, the subsequent motion—in *re. Bolton* (b)—would not have been made. There the expense of the application in *Askew v. Peddle*, as between solicitor and client, was ordered to be borne by the solicitor. That could not have been so had the client been entitled to them from the opposite party. The language of Lord *Langdale* seems also clearly to import this. We think, therefore, that the order must be upon payment of costs.

**Judgment.**

### ROBERTSON V. MEYERS.

*Practice—Further directions.*

The decree being defective in several particulars, the court, on further directions, supplied, as far as possible, the defects of the decree, without a re-hearing of the cause.

Mr. *McDonald*, for the plaintiff, cited Perkins' edition of Daniel's Chancery Practice, p. 1520; *Attorney-General v. The Mayor, &c., of Galway*. (c)

Mr. *Turner*, contra, referred to Seton on Decrees, p. 38, and cases there cited; also *Berwick v. Murray*. (d)

ESTEN,\* V. C.—The bill in this case, which has been taken *pro confesso* against the defendant *Meyers*, alleges that, while he was the attorney of the plaintiff and in possession of his papers, he purchased from his co-defendants, *Smith, Fuller, and Dick*, a judgment obtained by them against the plaintiff in an action, which had been defended by the defendant *Meyers*, for the plaintiff, at a great under-

(a) 14 Sim. 301. (b) 9 Beav. 272. (c) 1 Mol. 95. (d) 14 Jurist, 659.

\*The Chancellor had been engaged in the cause while at the bar.

value, and then rendered an account to the plaintiff, in 1850. which this judgment was charged at its full amount; that he subsequently procured from the defendants, *Smith, Fuller and Dick*, an assignment of two other judgments obtained by them and the defendant *Dick* respectively against the plaintiff, in actions likewise defended by *Meyers* for the plaintiff, for a nominal consideration; together with the unperformed part of an agreement entered into and almost wholly carried into effect by the plaintiff, under the advice of *Meyers*, for the satisfaction of these judgments; that the account already mentioned to have been rendered by *Meyers* to the plaintiff was satisfied by the plaintiff, in pursuance of an agreement entered into between the plaintiff and *Meyers* for that purpose, upon the supposition, on the part of the plaintiff, that *Meyers* had paid the full amount of the judgment first mentioned to *Smith, Fuller and Dick*; and that about the time of the completion of this agreement *Meyers* rendered another account to the plaintiff, charging him with £33 back rent on a lot, included in the agreement between the plaintiff and *Smith, Fuller and Dick*, which was leasehold, and was, under the stipulations of such agreement, to be converted into a freehold; also with £91 5s., the remainder of the purchase money required for effecting such conversion, after deducting a sum of £40 already paid to Messrs. *Smith, Fuller and Dick* by the plaintiff for that purpose; and with two sums of £250 and £90 as the gross and annual value for six years respectively of another lot, stipulated by the agreement in question to be conveyed by the plaintiff to *Smith, Fuller and Dick*, and which had been accordingly conveyed in a manner which had been accepted as a satisfaction of this part of the agreement, but which lot *Meyers*, by the account last mentioned, repudiated on account of an alleged defect in the conveyance. The bill also alleged that the account secondly delivered by *Meyers* was accompanied by a letter, in which he required satisfaction of such account within a week, and threatened, in default of compliance, to issue a writ of *capias ad satisfaciendum* against the plaintiff. It appears further, that plaintiff was arrested by *Meyers* in pursuance of this

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threat, and remained in prison a week, at the expiration of which time he was discharged upon the limits; and that he subsequently applied to the court of Queen's Bench to discharge the writ and the arrest, which application was granted; whereupon the defendant *Meyers* commenced an action of debt upon one of the judgments against the plaintiff; and subsequently an action of assumpsit on the first of three promissory notes for £100 each, given by the plaintiff to *Meyers*, under the stipulations of the before mentioned agreement between them, for the balance of *Meyers'* account against the plaintiff. The bill prayed that the first mentioned account might be opened as to the judgment charged in it, so that if it should appear that *Meyers* had paid less than the amount of the judgment the plaintiff might have the benefit of it. It also prayed, that if *Meyers* paid for the two other judgments, and the agreement entered into for their satisfaction, less than was due under such agreement from the plaintiff, he might be declared a trustee for the plaintiff; if otherwise, that such agreement might be specifically performed by *Meyers*, and satisfaction entered on the roll of the judgments on payment by the plaintiff of what was due from him under the agreement. The decree directed that the master should enquire what *Meyers* paid for the first mentioned judgment, and if it should appear to be more than he had received from the plaintiff on account of that judgment that the plaintiff should pay the deficiency with interest; if less, that the excess should be paid by *Meyers*, with interest, to the plaintiff. The master has found that *Meyers* paid the sum of £167 13s. 8d. for this judgment; the full amount of which, however, was £424 3s. 3d. The consequence is, that the plaintiff is entitled to the difference between these two sums. According to the express terms of the decree, this amount ought to be paid by *Meyers* to the plaintiff, with interest. The master has also found that nothing has been paid by the plaintiff in respect of this judgment. It appears to me, however, that as the full amount of the judgment was £424 3s. 3d., and the balance due from the plaintiff on the account was only £300, something must have been paid by

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him on this account. The decree ought to have directed that whatever might appear to be due from *Meyers* in this respect, should be applied to the satisfaction of the notes held by him for the balance of the account. The master, perceiving the justice of this arrangement, has, with much good sense, reported that the balance of £300 was reduced by the deduction from the amount of the judgment to £77 2s. 7½d., and he has calculated interest on this amount from the date of the agreement. This is all the master could do. It remains with the court to make the required arrangement, and the direction upon this part of the case must be, that the two latter notes must be delivered up to be cancelled, and that the first note should stand as a security only for the sum reported by the master as the actual balance due, for which purpose the requisite endorsement must be made upon the note. The decree further directs that the master should enquire what *Meyers* had paid for the two judgments first obtained, and the agreement entered into for their satisfaction; and if it should appear to be less than was due from the plaintiff under the agreement, that *Meyers* should be a trustee for the plaintiff, and upon payment by the latter of what was so due, that *Meyers*, or *Smith, Fuller & Dick* should enter satisfaction on the judgments; otherwise, that *Meyers* should specifically perform the agreement, and should enter satisfaction on the roll of the judgments on receiving from the plaintiff what was due under the agreement. It of course was necessary for the master to ascertain what was so due from the plaintiff; but the decree gave him no directions for his guidance in this respect. The agreement appears to have been performed by the plaintiff in all particulars, except the conversion of the leasehold into a freehold; and it simply provided that such conversion should be effected without fixing any time for that purpose. Nothing could have been more general or vague than the terms of the decree in this respect. The master—performing his duty as well as he was able under such circumstances—has reported that £91 5s. was the sum required for converting the leasehold in question into a freehold, and

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not knowing whether interest was to be paid by the plaintiff or not, has calculated the interest, and left it to the court to award the payment of it or not as it should deem fit. It seems to me, however, that the defective directions of the decree have necessarily rendered the report defective. It appears, also, that considerable misapprehension has prevailed on this subject. The bill states that *Meyers* purchased from *Smith, Fuller & Dick* the unexecuted part of the agreement in question. It appears, however, from the evidence of Mr. *Ross*, that he purchased not only so much of the agreement as remained unperformed, but also such parts of the lands conveyed in pursuance of it as had not been alienated, and two other lots in addition, and paid £300 for the whole. It is very possible, therefore, that this particular part of the agreement may have been purchased at an undervalue, and the plaintiff may have been entitled to some relief in that respect. The master, however, reporting that *Meyers* paid £300 for the agreement, the plaintiff, without excepting to the report, has simply upon the hearing on further directions contended against the allowance of interest on the £91 5s. I do not consider that I am entitled for this purpose to look at Mr. *Ross*' evidence, which indeed is wholly immaterial for any purpose upon this occasion. I must assume, therefore, that the £300 was paid for so much of the agreement as remained in *feri*—that is, for the leasehold to be converted into a freehold—which the report naturally imports; and upon this supposition the agreement is to be specifically executed on both sides. I see, however, upon the face of the report, that some misapprehension has arisen as to the amount due under the agreement. It appears from the report itself and the bill—to which the report refers—that the £91 5s. is the balance of the purchase money, payable for the conversion of the leasehold into a freehold. But in truth, the amount due under the agreement is that which the court would order the plaintiff to pay towards the specific execution of the agreement. The purchase of the fee was to be made within a reasonable time. *Smith, Fuller & Dick* allowed the plaintiff time for this purpose, but so as not to prejudice themselves. The

property being leasehold, was subject to rent, a fact which is corroborated by the charge in the second account rendered by *Meyers* in respect of back rent, to which no objection is suggested by the bill. The defendants may have sustained some special damage by reason of the neglect to acquire the fee-simple of the property, and if it were necessary to enquire into this matter, it would be the subject of an issue *quantum damnificatus*, since this court could not determine it without the assistance of a court of law. But no such fact is suggested, and therefore an enquiry of that nature is not necessary. I cannot avoid seeing, however, that rent has either been paid for this property or is in arrear, and that in either case it ought to be paid by the plaintiff, who must himself specifically perform the agreement of which he seeks the specific performance. The master should have been furnished by the decree with some directions necessary to enable him to calculate what was due under the agreement. He should have been directed to enquire whether rent was due or had been paid in respect of the property, and to calculate its amount. The decree having omitted this necessary direction, and the report being unavoidably defective for that reason, it becomes necessary to supply the defect upon this occasion. A reference back to the master, however, may perhaps be avoided. The opinion of the court is, that the plaintiff should pay not only the balance of the purchase-money, but also the back rents, with interest on such back-rents if actually paid by the defendant, not if merely in arrear. It does not appear to me that the defendant should pay interest on the £40 paid by the plaintiff in scrip. It is probable that the opinion of the court being known, the different amounts may be ascertained with sufficient precision without the expense of a reference to the master. On payment of these amounts, the defendant *Meyers* must enter satisfaction on the roll of the judgments, and must deliver up the agreement to be cancelled. I do not feel warranted in varying the direction as to costs.

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## COVERT V. THE BANK OF UPPER CANADA.

*Practice—Re-examination of witness.*

Where the defendant's solicitor had omitted to ask a witness what had become of a deed, mentioned by the witness in the course of his examination, in consequence of which the defendants would have been precluded from giving secondary evidence of the contents, permission to exhibit an interrogatory, to be settled by the examiner, to prove where the deed was, was given to the defendants after the cause had been put in the paper for hearing.

It appeared from the affidavits filed on this motion, that one of the witnesses had been examined by the defendants, respecting the execution of an assignment mentioned in the pleadings, but it had been omitted either to ask him the question or to take down his answer, if put to him, respecting the party in whose possession the assignment was, or what had become thereof, with a view to letting in secondary evidence of the contents of the instrument.

An application was now made by the defendants to re-examine the witness on this single point.

Judgment. The cause had been in the paper for hearing for some time past.

Mr. *Vankoughnet* supported the motion.

Mr. *MacDonald*, contra, cited 1 Smith's Ch. Prac. 95.

The cases cited appear in the judgment.

JAMESON, V. C.\*—This was an application on the part of the defendants to re-examine Mr. *Boulton*, a co-defendant, who has been examined as a witness in the cause, for the purpose of remedying a defect apparent upon the examination already had.

It appears that on the examination of Mr. *Boulton*, that gentleman made direct reference to a certain agreement between himself and the plaintiff, *Covert*, the nature of which, if established, would, it is contended, bear strongly upon the equity of the cause, in which an interest, incompatible with any such equity, is imputed to the witness. The question which would naturally have suggested itself to the party interrogating the witness would have been, "Where is such agreement?" &c. And one can hardly imagine a solicitor, conducting the defence and present at the examination, omitting, after such a disclosure, suggest-

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\* The Chancellor was concerned in this case while at the bar.

ing the question. Indeed, it is sworn by the solicitor that such question *was* put to the witness, but that by some oversight or inattention of the examiner the answer does not appear upon the depositions.

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It is to supply this omission and to be able to obtain or demand inspection of this agreement, before secondary evidence of its contents can be given, that the present motion is made, and the recent cases of *Cockerell v. Cholmeley*, (a) *Healey v. Jagger*, (b) *Bridge v. Bridge*, (c) *Rowley v. Adams*, (d) *Stanney v. Walmsley*, (e) and *Stooke v. Vincent*, (f) were cited, all of which are more or less in point; the more so, inasmuch as the strict rule in England on this subject, where all examinations are taken in secret, while here they are taken in public, cannot in many instances apply.

The motion was resisted, however, as being contrary to settled law and practice, and the very important case of *Ingram v. Mitchell* (g) was cited. There an application was made to Lord *Eldon* for leave to re-examine a witness as to certain interrogatories filed, and upon which he might have been examined, but was not, they having been from some cause or other passed over, and it having been deemed advisable that he should be examined upon them, the motion was made. Lord *Eldon*, however, rejected the application at once, on the ground that time had elapsed since the examination within which it might have been in the power of the witness to ascertain or be instructed as to what testimony it would be expedient to give, without perhaps strict regard to its truth. Such a practice, may be easily imagined, would lead to frauds interminable. Now it seems to me that that case affords no parallel to the subject of the present motion, nor do the more modern decisions cited in support of it conflict with any point in the decision of Lord *Eldon*, which is as clear law at the present day as at that on which it was pronounced. Yet though, under the circumstances of that case, Lord *Eldon* decided that it was "impossible to let him in," he at the same time remarked, that "if it

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(a) 3 S. 313. (b) 3 S. 494. (c) 6 S. 352. (d) 1 M. & K. 543.  
(e) 1 M. & C. 361. (f) 1 De G. & S. 705. (g) 5 Ves. 297.

1850. turns out to be a mistake of the examiner, it must certainly be rectified, but I must be sure of that some other way ;” meaning, than the statement on affidavit of the witness himself.

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Here no interrogatory has been passed over, to which testimony might be subsequently manufactured, even if the relative position of the parties could well admit of the idea of collusion, Mr. *Boulton* necessarily coming under the term *unwilling witness*. The witness was examined to the interrogatory, but a question, naturally flowing from a fact he had disclosed, was omitted to be put, or, as is alleged, the answers omitted to be taken down. It comes within the case of *Stanney v. Walmsley*, and the observation of Lord *Eldon*, already quoted.

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Now if this question, in relation to the instrument referred to by the witness, be permitted to be put, “Where is the agreement?” the only answer the witness can return is in the alternative—that he knows and can inform them ; in which event inspection of the instrument can be demanded ; or that it is lost, and he does *not* know ; in which case the defendants will be let in to give secondary evidence of its contents, and which, it is alleged, is easily obtainable of a satisfactory nature. It is therefore in fact a matter of the smallest importance to the defendants what Mr. *Boulton’s* answer may be, for he has already stated the main fact, that there was such an agreement. At all events, it is impossible to suppose any collusive answer for the undue advantage of the parties seeking it. The case of *Ingram v. Mitchell* cannot in principle apply, even in the absence of the authorities in favour of granting the indulgence asked for. I am of opinion, therefore, that the motion should be granted on payment of costs.

ESTEN, V. C.—This is an application by the defendants for leave to re-examine a witness, who had been examined on behalf of the plaintiff in October, 1849, upon which occasion the defendants cross-examined him, and who was also examined in June last on behalf of the defendants. Although publication has not formally passed, yet enough of the witness’ evidence has been disclosed to the court

to shew exactly what is intended to be proved. Application for re-examination of witnesses will not be entertained until after publication, because the court must know what evidence has been given, in order to judge of the propriety of granting what is asked. This rule does not apply literally here, because the purport of the evidence may be known before publication; accordingly the evidence of Mr. *Boulton*, the witness in the present case, has been disclosed upon affidavit, and although the opposite party objects that the application is premature, inasmuch as it is made before publication, yet, as it is not suggested that any material evidence has been withheld, I consider the objection refers to the technical rule fixing the time for applications of this nature, and that all the evidence has been produced which bears upon the question at issue. However, if it can be suggested that the other evidence given by this witness can be material to the determination of this question, it had better be produced, and the motion can be adjourned for that purpose. Supposing, however, that the court has before it all the evidence which it is material to consider on this occasion, I think that this application ought to be granted. It is never desirable to exclude evidence, because thereby risk is incurred of deciding the case in which it is done in ignorance of facts, material to its right determination; but certain technical rules have been established upon this subject for the discouragement of laches and the prevention of malpractice, which it is highly necessary to observe and enforce on all proper occasions. These rules, however, are relaxed when no danger exists of incurring the mischiefs which they were designed to prevent, and where therefore the exclusion of evidence, which might be material, would be unjust, because it would be unnecessary. In the present case no trace of design is discernible on the part of the defendants, in omitting any question for the purpose of procuring a re-examination of the witness; the omission appears to have arisen from accidental oversight, either of the examiner or of the solicitor of the defendant, and in either case, I think it ought to be supplied. The object of the re-examination is not to vary the evidence already given, but to prove a collateral

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1850. fact, necessary to render that evidence admissible, and not the slightest danger exists of any malpractice or of the introduction of any evidence that is not true. The case exactly resembles those of *Cox v. Allingham* (a) and *Banks v. Farquharson*, (b) where secondary evidence being offered without any ground having been laid for its admission, the cases were adjourned, in order to enable the party offering the evidence to supply the defect. I do not express any opinion as to the effect of the evidence which it is desired to render admissible, nor should I think it right, upon this motion, to determine what effect it may have. It is sufficient for me to see that it is of importance. It is true that the fact which it is intended to establish is not in issue in the cause, and the proposed evidence therefore can have no other effect perhaps than to afford ground for enquiry; but I do not think that this circumstance furnishes any good reason for its exclusion; I infer that the fact of the agreement referred to by the witness has only lately come to the knowledge of the defendants. They are not in fault therefore for not having put it in issue, nor do they appear to have been guilty of any laches in applying to the court, and at this stage of the cause the object in view may be obtained more easily by means of an enquiry than in any other mode. Let the defendants therefore take an order for the re-examination of Mr. *Boulton* on a single interrogatory, to be settled by the examiner, upon the particular point of where this agreement is, or what is become of it, the plaintiff to be at liberty to exhibit an interrogatory, to be settled by the examiner, for the cross-examination of the witness, such examination to be by the examiner, and the defendants to pay the costs of this application.

### ERSKINE V. CAMPBELL.

*Executor—Rents—Interest—Costs.*

In a suit against an executor for an account, it appeared that before the institution of the suit he had represented to the guardian of the infant plaintiff that the estate was indebted to him, as such executor, in £16, but in his answer to the amended bill admitted his indebtedness to the estate in a sum of £187 11s. 6d. while the master reported the true amount to be £356 2s. 8d; defendant had also stated in his answer to the original bill, that he had received from the principal debtor of the estate £404 3s. 9d.

and no more; while he admitted by his answer to the amended bill that he had so received £519 4s. 5d., which sum he alleged he had received payment of in goods instead of money, in consequence of the debtor's embarrassments, and that he had not applied any part of this amount to his own use, while the fact, as afterwards discovered, was that the payment was partly in money, and that *all* received had been applied by the executor to his own use. The court, under these circumstances, charged the executor with the costs of the suit—with interest on the balances from time to time in his hands, and directed the account to be taken with annual rests.

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Mr. *R. Cooper*, for the plaintiff, cited *Williams on Exors. 1567 & 1752, Goodchild v. Fenton, (a) Hyde v. Hartford, (b) Stackpoole v. Stackpoole, (c) Turner v. Turner. (d)*

Mr. *C. W. Cooper* and Mr. *Skelton* for the defendant.

The facts of the case are fully set forth in the judgment.

THE CHANCELLOR.—This suit was instituted by the infant daughter of a Mr. *Erskine*, for the purpose of having the will of her father established, for an account and receiver; it was also prayed that a guardian might be appointed, and a proper allowance made for the maintenance of the infant. At the hearing, on further directions upon the master's report, it was argued that the executor should be charged with interest upon the balances found to be in his hands from time to time, and that the decree should be with costs; and very numerous authorities were cited for the purpose of establishing the plaintiff's right to that relief.

Judgment.

This application is, to some extent, one to the discretion of the court, and it is not very easy to extract any satisfactory principle from the cases on the subject. But I do not find it necessary to enter upon an investigation of the authorities, because, upon looking into the report in this case, it is, I think, only too evident that the court is bound to do what the plaintiff has asked, upon the plainest principles of justice.

No question arises as to the regularity of charging the defendant with interest, under present circumstances, and at this stage of the cause, because a case for this relief is very distinctly stated in the bill. The only question therefore before us is, whether the facts now appearing warrant such a decree?

Prior to the institution of this suit, and sometime during

(a) 3 Y. & J. 481.  
(c) 4 Dow. 209.

(b) 2 Atk. 125.  
(d) J. & W. 39.

1850. the year 1846, the defendant represented to Mr. *Clarke*, the grandfather of the infant, who has instituted this suit as her next friend, that the estate of the testator was indebted to him in a sum of about £16. This statement is, I find, reiterated in the answer to the original bill. Now, it is clearly the duty of a trustee to be at all times ready with his accounts. Peculiar circumstances may arise calling for indulgent consideration. But in dealing with an estate of such trifling amount, the accounts of which were so little complicated, I have not been able to discover any apology for the serious errors into which this defendant was betrayed, and that long after the assets had been realized. The principal part of the estate of this testator, indeed the only portion respecting which a mistake was possible, consisted of a debt from Messrs. *Gooding*. With respect to one portion of that debt, a sum of about £207, no observation need be made, because I understand the master's report as affirming the propriety of the executor's proceedings, in relation to the security taken for that amount. With respect to the residue of this debt from the Messrs. *Gooding*, I find these passages in the answer to the original bill: "and defendant has in fact in various ways received from the said Messrs. *Gooding*, to the present time, in respect to the said last mentioned debt, the sum of £404 3s. 9d., and no more." And again, after giving credit for a legacy paid by the executors of Mr. *Erskine's* father, he says: "which said sum of £139, and the said sum of £404 3s. 9d. so paid by the said Messrs. *Gooding*, being added together, amounting to the sum of £543 3s. 10d., form the whole amount of moneys received by the defendant, from or in respect of the estate of the said *J. D. Erskine*, excepting the sum of £23 7s. 6d., being the amount of a quantity of hats sold by *J. D. Erskine* to Messrs. *Gooding*, which they omitted to account for until 1840, and also a small amount not exceeding 15s. from some person who owed the estate, which being added to the said sum of £543 3s. 10d. make a total of £567 6s. 4d., principal and interest so received by the defendant as aforesaid." Not to multiply quotations, the statement as to the amount received from the Messrs.

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*Gooding*, has been repeated so frequently, and in such a variety of shapes, as to leave no grounds, at least none which can properly influence our judgment, for attributing it to inadvertence or mistake

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The bill was amended, and from the answer to the amended bill, as well as from the master's report, it is quite clear that the sum received from the Messrs. *Gooding* was not the sum of £404 3s. 9d., as repeatedly stated in the defendant's former answer, but a sum of £519 4s. 5d., the difference being composed of interest paid by the Messrs. *Gooding*. Circumstances may be imagined, by which it might be possible to account for the mis-statement in the former answer, but' having reference to the mode in which the Messrs. *Gooding* kept this interest account, and the mode in which the payments were made, as exhibited by the statements from time to time presented by the Messrs. *Gooding*, I find it extremely difficulty to reconcile the omission of this large amount, with honesty of purpose in the defendant.

Judgment.

Neither am I able to apprehend the account which this defendant has furnished of the discrepancies between his answers to the original and amended bills; he says "that he ought not to be bound by the admissions contained in his answer to the original bill, of the amount therein in that behalf mentioned, *and consisting as aforesaid for the most part of interest being in his hands*, inasmuch, as he says, as the fact was, that blanks were left in the draft and engrossment of the said answer by his counsel and solicitor, who prepared and engrossed the same, respectively, for the said amount, and he inserted it himself at a great distance from Toronto, where the said answer was prepared and engrossed *under the erroneous supposition that he was liable for interest on moneys in his hands.*" But when the answer to the original bill is examined, it is found that the sum spoken of consists in no part of interest; the large sums paid by the Messrs. *Gooding* from time to time for interest, were all carefully excluded; the amount admitted consists altogether of principal, the defendant having not only omitted to charge himself with interest on the considerable ba-

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The answer to the original bill furnishes no account of the manner in which the debt has been paid by the Messrs. *Gooding*; but, in his answer to the amended bill, he states that he had been induced to accept payment in goods instead of money, on account of the embarrassment of these debtors, and with a view of protecting the estate of his testator from loss; and the allegation is introduced as affording ground for exempting the defendant from interest on the balances in his hands. But on examining the accounts, considerable portions of the debt would appear to have been paid in cash; other considerable sums were paid by delivery of goods, it is presumed, but in discharge of orders given by the defendant to creditors of his own; and the whole must be taken to have been applied by the defendant to his own use. How the schedules to this answer can be reconciled with the statement to be found there, that no part of the estate was so applied, I am wholly unable to conjecture. Several sums, the receipt of which is now established, were wholly omitted from the original answer.

The last observation which I feel it necessary to make, as justifying the decree to be pronounced in this case, is, that while the defendant in his answer to the amended bill admits a balance of but £187 11s. 6d., the master in a report, confirmed by the consent of the defendant, has charged him with £356 2s. 8d., and that exclusive of interest. Under such circumstances, it is clear, I apprehend, that the master must be directed to calculate interest upon the balances in the hands of the defendant, with annual rests; and that the decree must be with costs.

ESTEN, V. C.—It seems that the defendant ought to pay interest and costs, on the authority of *Ashburnham v. Thompson*. (a)

There the executor was charged with costs, although he was made to pay interest only at the rate of four per cent.; he had not invested the money as directed by the will, but

had kept it in his hands. This would have been mere negligence, which would have rendered him liable to the payment of interest, but he would have received his costs, if he had not been subject to any imputation of improper conduct; but he had trafficked with the money, and had realised £600 profit in stock transactions. The money, however, appears always to have been ready at his banker's. This, in my opinion, was not so reprehensible as the conduct of the defendant here.

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He has confessedly applied a considerable part of the infant's property to his own use. He alleges, in excuse for his conduct, that it was absolutely necessary; but the facts do not support this allegation; his duty was to have obtained what he could from the debtors to the estate, by legal proceedings if necessary. We do not know what the result of this course of conduct would have been, because the defendant did not attempt it; and every presumption should be made against a trustee who, by departing from his duty, has rendered it impossible to determine what effect would have followed from a strict adherence to it. Instead of pursuing this course, he received what the principle debtors paid in a manner which involved an application of it to his own use. He alleges in excuse of this conduct, that it was absolutely necessary for the security of the estate. But how could the estate be in a worse position than it is at present? The facts warrant the supposition that had proper efforts been made, the whole or part of this debt might have been realised and invested for the benefit of the infant. These efforts the defendant forbore to make, and we are bound to believe, for his own benefit. And he has thereby deprived this infant of a portion of her property in order to apply it to his own use, without any certainty or probability, that I can see, of being able to re-pay it.

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## MAITLAND V. McLARTY.

*Mortgagor—Vendee of.*

Where, on the sale of an estate, the purchaser executed a re-conveyance by way of mortgage to the vendor, and afterwards sold a part of the property, by a deed which contained a clause in the following words ; “ *that I, the said A. M., and my heirs and assigns, and every of them, from all estate, right, title, interest, property, claim and demand, of, into or out of the said parcel or tract of land, or any part thereof, are, is, and shall be, by these presents, for ever excluded and debarred ;*” upon a bill by his vendees, the original purchaser (and who had executed the mortgage) was decreed to reimburse his vendees the amount they should be compelled to pay in order to discharge such mortgage, and in default a sale of the portion of the estate retained by him.

Mr. *Hector*, for plaintiffs.

Mr. *J. Crickmore*, for defendant *McLarty*.

Mr. *Strong*, for defendant *Wilkinson*.

The facts of the case, and the points relied on by counsel, are so fully set forth in the judgment, that any statement of them here would be unnecessary repetition.

Judgment. THE CHANCELLOR.—The pleadings and evidence in this case have been drawn out to great length, but, in the view we have taken of it, the facts are few and unembarrassed.

It appears, that on the 18th of February, 1839, one *Burnham*, being, or claiming to be, the owner of lot No. 1, in the 5th concession of Darlington, sold it to the defendant *McLarty* for the sum of £250. This sum was made payable in ten annual instalments ; and was secured by an indenture of mortgage executed contemporaneously with the conveyance from *Burnham* to *McLarty*. Upon the 24th of the same month *McLarty* sold to the plaintiffs the northern three-quarters of the same land, for the sum of £187 10s., and the transaction was completed by deed of that date. The purchase money, as agreed upon, was not in fact paid at the time, but was made payable in ten equal annual instalments, and was secured by the promissory notes of the plaintiff, dated the 18th of February, 1839, and payable on that day in each succeeding year. The amount due to *Burnham*, remaining in great part unpaid, he, on the 7th of June, 1848, assigned his security to the other defendant, *Wilkinson*, in consideration of the amount then due.

Such are the undoubted facts ; but, upon this foundation, widely different superstructures have been raised by the

different parties. The plaintiffs allege, that *McLarty's* purchase was made in concert with them, and upon an understanding that the northern three-quarters should be conveyed to them. They say that the deed of the 25th of February was executed in pursuance of that arrangement; and that the intention of all parties was, that they should purchase upon the same terms that *McLarty* himself had dealt with *Burnham*. They represent *McLarty* as having conceived, at a period long subsequent to the execution of the deed, the fraudulent design of compelling them to pay the purchase money mentioned in the deed, as well as three-fourth parts of the debt due to *Burnham*. And they charge the assignment to *Wilkinson* to have been a step taken in pursuance of that fraudulent purpose, *Wilkinson* being in fact, as they say, a mere trustee for the other defendant.

*McLarty*, on the other hand, alleges, that his original purchase was made without reference to the plaintiffs; that the subsequent sale to them was a sale of the equity of redemption merely, at the advanced price mentioned in the deed; and that *Wilkinson's* purchase was a *bona fide* transaction, although entered into at his instance, and for his protection. He submits to make a title to the plaintiffs on payment of the balance of the purchase money due under the deed of the 25th of February, as also their proportion of the mortgage money due to *Wilkinson*.

*Wilkinson* denies all fraud, and claims the full benefit of his security.

The answer of *Wilkinson* furnished the principal, if not the exclusive, evidence relied upon for the establishment of the fraud charged against him. It was said, that in his original answer he had admitted the sale from *McLarty* to the plaintiffs to have been made upon the terms stated in the bill; and that the variation from this statement in his further answer, and his explanation of the mistake, was unworthy of credit, and afforded pregnant evidence of fraud. It was affirmed that *Wilkinson* had admitted in his answer, the necessity under which he was placed of borrowing the funds requisite for the discharge of *Burnham's* incumbrance, and this circumstance was confidently relied upon as dis-

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1850. proving the *bona fides* of his conduct. And, lastly, it was  
said that he had acted with full notice of the position of all  
parties.

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That discrepancies are to be found between the different answers of *Wilkinson*, is not to be denied; and I quite agree in many of the observations of the learned counsel for the plaintiffs upon that subject. This court has ever evinced the utmost reluctance to permit a defendant to vary a statement deliberately advanced under the sanction of an oath. Every variation of that kind is criticised with doubting and jealous care; and where a wilful misstatement is discovered, the effect given to it, upon well settled principles of evidence, is important. It tends, not only to discredit the whole defence, but to insure for the opposing testimony more favourable consideration. I have no intention, in any observation which I may now make, of weakening the force of these rules, because my experience of the unfortunate laxity which has prevailed upon the point, has convinced me of the absolute necessity of enforcing them with rigid exactness. But, after an attentive perusal of the several answers of this defendant, I have been unable to discover in them any evidence of the fraud with which he is charged. Had these discrepancies occurred in the answer of *McLarty*, too much reliance could not have been placed upon them. But the answer of *Wilkinson* is not evidence against *McLarty*; and having regard to his own position, the passages pointed out have produced upon my mind an effect, the opposite from that contended for by the learned counsel for the plaintiffs. First, with respect to the terms of the sale from *McLarty* to the plaintiffs, that is a point with which *Wilkinson* had no personal concern. Whatever those terms might prove to have been, his position would be equally secure. But, on the assumption of his having combined with *McLarty* to defraud the plaintiffs, by fixing them with the payment of *Burnham's* mortgage in addition to the purchase money actually due, (which is what the plaintiffs contend for,) surely the discrepancy pointed out is the last one we should have found. Had these parties combined for the express purpose of

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untruly asserting the sale to have been at £375, it is utterly impossible that *Wilkinson* should have stated it in the very outset of his answer to have been a sale for £187 10s., exactly as represented by the plaintiffs. In the absence of concert, the discrepancy may have crept in as explained in the further answer. It is quite irreconcilable with the notion of deliberately concocted fraud.

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The same sort of observation is applicable to the argument based upon *Wilkinson's* admissions (as well as upon independent testimony) that he had borrowed the sums requisite to meet Mr. *Burnham's* demand. This evidence is obviously destructive of the plaintiff's case. Their hypothesis (for it is little more) is, that *Wilkinson* is a mere man of straw, a trustee for *McLarty*, and that the assignment to him should be treated as an assignment to *McLarty*, and as such cancelled. Well, upon that supposition, the funds requisite for the purpose would have been supplied by *McLarty* and not by *Wilkinson*; but the evidence establishes incontrovertibly that *Wilkinson* made strenuous efforts to obtain the funds from various persons, with a view to some personal advantage which he expected to result; and that he did, in fact, raise the larger part by mortgage of his own real estate. Then as to notice. Assuming *Wilkinson* to have had the fullest information upon all the matters stated by the plaintiff, I am at a loss to discern in what way his rights are supposed to be affected by such notice. Whether the mortgage money were payable by the plaintiff or *McLarty*, it was unquestionably due to *Burnham*. The estate could not be redeemed without its payment. How have the plaintiffs been prejudiced by the assignment of this security to *Wilkinson*? All such rights as they had, while it remained in the hands of *Burnham*, they still retain; but why is their condition to be improved? How can the simple transfer of a mortgage security discharge a debt never paid? Upon the whole, the evidence seems to me quite insufficient to establish the charge of fraud alleged against *Wilkinson*.

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It will be unnecessary for us to enter into a minute consideration of the mass of evidence adduced for the purpose

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of elucidating the various circumstances connected with the sale from *McLarty* to the plaintiffs, because we are of opinion that they have placed the true construction upon the covenant in the deed of the 25th of February, 1839. That instrument, after granting the premises in question, proceeds in these words: "So that neither I, the said *Alexander McLarty*, nor any other person or persons in trust for me or them, or in my or their name or names, or in the name, right, or stead of any of them, shall or will, can or may, by any ways or means whatever, hereafter have claim, challenge, or demand any right, title or interest of, in, to, or out of the said parcel or tract of land above mentioned, or any part thereof." Before proceeding further, I would remark that the clause I have just read is imperfect. The words, heirs and assigns, should have been inserted after the name of the grantor. Much of the passage is insensible without them; and they seem obviously to have been omitted by mistake. But it is unnecessary to consider the effect of the omission, because the succeeding paragraph (which is sufficient for the plaintiff's purpose) has been correctly worded. The deed proceeds—but that I, the said *Alexander McLarty*, and my heirs and assigns, and every of them, from all estate, right, title, interest, property, claim and demand of, into or out of the said parcel or tract of land or any part thereof, are, is, and shall be, by these presents, for ever excluded and debarred." It seems to me to be too plain for argument, that *McLarty* is bound under this instrument to indemnify the plaintiffs against *Burnham's* mortgage. It was, indeed, contended by the learned counsel for the plaintiffs, that the operation of this deed is to debar *Burnham* as claiming through *McLarty*, and *Wilkinson* as claiming through *Burnham*, from asserting any claim to these premises adversely to the plaintiff. And I so understand the bill. It is hardly necessary to remark that *Burnham's* rights cannot be so affected by a deed executed subsequent to his mortgage. But, assuming the construction of the deed to be as I have stated, it is quite obvious, that its effect cannot be controlled by parol testimony; and the voluminous evidence adduced would be

inadmissible except for the purpose of shewing the instrument to have been drawn incorrectly through mistake or fraud. But, so far from establishing that issue, the evidence which has been adduced leads me to conclude, and, coupled with the admitted facts, has convinced me, that the deed, as interpreted by us, is in accordance with the intentions of the parties, and that the defence now advanced by *McLarty* has no foundation in truth.

*Wilkinson*, therefore, must be redeemed, and he must have his costs; the amount so paid by the plaintiffs, including costs, must be re-paid by *McLarty*, after deducting such portion of the purchase money as may remain still due; and in default, that portion of the property which belongs to *McLarty* must be sold; he must make good any deficiency that may arise, and must pay the costs of this suit.

Mr. *Crickmore* submitted that *McLarty* ought not to be made to pay the costs incurred in taking the depositions, which were clearly unnecessary; but, *Per Cur.*—*McLarty's* own conduct has given rise to all the difficulties in this case; and although the plaintiffs may have stated their case at greater length than was absolutely necessary for the attainment of their rights, still, under the circumstances, the proper direction to give, was that he should be made pay the costs.

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The decree drawn up in this case directed a reference to the master to take an account of what remained due to the defendant *Wilkinson* on the foot of the mortgage from *McLarty* to *Burnham*, and to tax *Wilkinson* his costs—which, together with principal and interest, (due on the mortgage,) are to be paid to said *Wilkinson* within six months after report, otherwise bill to be dismissed.

Also to take an account of what, if any thing, remains due for principal and interest on account of the purchase money from plaintiff to defendant *McLarty*; and after deducting that amount from what shall appear to have been paid to *Wilkinson* in pursuance of such decree, *McLarty* to re-pay and reimburse the amount of the difference to plaintiff. And if default made in payment, the portion of the premises belonging to *McLarty* to be sold by and under the direction of the master, and proceeds applied first to reimburse plaintiffs what they shall have paid to *Wilkinson*, together with their costs, and residue, if any, to *McLarty*. But if amount of proceeds be insufficient to reimburse the plaintiffs what they shall so pay *Wilkinson* as aforesaid, together with their costs, *McLarty* ordered to pay deficiency and costs of plaintiffs.

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## PATTERSON V. SCOTT.

*Practice—Re-examination.*

In a creditor's suit a witness had been examined in the master's office touching the claim of an alleged creditor, with a view to the claim being disallowed; after his examination had been concluded, the plaintiff stated on affidavit that since the examination he had learned that the witness could have deposed to the fact of the alleged creditor having admitted that his claim had been settled, and moved to be allowed to re-examine the witness on this point; the motion was refused with costs.

This was a creditor's suit, and in the master's office an examination of one *Laughton*, a witness for the plaintiff, had taken place, with a view to disallowing the claim of one *Thompson*, an alleged creditor of the estate; after his examination had been fully closed, it was stated on affidavit that certain facts had come to the knowledge of the plaintiff, from which it appeared that *Laughton*, if interrogated, would have stated that *Thompson* had been heard to assert that his claim against the estate had been paid or satisfied, and

Mr. *Morphy*, on behalf of the plaintiff, now moved for leave to re-examine this witness, and cited *Bridge v. Bridge*, (a) and 2 Smith's Ch. Prac. 142, as authorities for what he asked.

Argument.

Mr. *Turner*, contra, cited *Willan v. Willan*, (b) and *Abervenny v. Powell*, (c)

THE CHANCELLOR.—In determining the propriety of permitting either the re-examination of a witness, or the production of further testimony after publication has passed, we must look not only to the necessity of excluding by every possible safeguard, impure testimony, a consideration of vital importance to the general administration of justice, but also to the importance of enforcing the orderly conduct of the business of the court. With respect to the former consideration, applications of this kind stand upon a somewhat different footing here and in England: there, the examination of witnesses being private, the production of further evidence after publication is permitted with great reluctance, because it is considered as opening a door to the introduction of false testimony; (d) here, however, examinations being public, and witnesses being subject to a *viva voce* cross-examination, the evidence is known to all parties

(a) 6 Sim. 130. (b) 10 Ves. 590. (c) 1 Mer. 130.

(d) See *Covert v. Bank of Upper Canada*, ante p. 566.

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at the time it is taken, and the passing of publication is, therefore, to a great degree, a mere formal announcement that the time for taking evidence has passed. This is to a great degree, but not altogether, because it is extremely desirable that the taking of evidence should be conducted *uno actu*, as it were; and, consequently, whatever tends to prevent that, as extending the time for examination beyond the limits allowed by the practice of the court, must and will be here as properly discouraged.

As to the re-examination of the same witness, that is not permitted at all without the special leave of the court, and leave is not granted unless it be shewn that the examination is necessary for the purposes of justice in the particular case, and unattended with circumstances which would render the precedent dangerous to the general administration of justice. This practice has been established with the same object as the former—the exclusion of false testimony—though upon different reasoning. The production of further evidence after publication is discountenanced, because of the evil consequences which would inevitably result from permitting parties to seek out new witnesses at a time when the whole evidence in the cause has been made public—when the weakness of his own case or the strength of his adversary has been disclosed: but the application to re-examine a witness is properly made only after publication passed, (a) when the court has an opportunity of considering the deposition as already taken; and leave to re-examine a witness is sparingly granted; because, to permit a witness after his examination has been closed, to alter the effect of his testimony, would afford the strongest possible temptation to fraud and artful suggestion on the part of those interested in the depositions; (b) the re-examination is, therefore, usually restricted to points upon which the witness has not been already examined; and when extended beyond that, it is only in a case which can be plainly seen to be exempted from the dangers to which I have alluded.

Judgment.

The affidavit filed in the present case fulfils none of those

(a) *Stanney v. Walmsley*, 1 M. & C. 361. (b) *Lord Abergavenny v. Powell*, 1 Mer. 130; *Bote v. Birch*, 3 Mad. 66.

1850. conditions. No reason has been furnished why the information now sought was not obtained from the witness on his former examination; the application, so far from being confined to points as to which the witness has not been examined, is expressly extended to such points, if indeed it must not be considered as wholly conversant about such matters; and lastly, the court has not been furnished with the means of determining whether the proposed re-examination may not be of the most objectionable character. I am of opinion that the motion must be refused, with costs.

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### PEEL V. KINGSMILL.

#### *Pleading—Discovery.*

To a bill of discovery in aid of an action at law, to which it appears the defendant has pleaded, the defendant will not be permitted to plead a legal defence in bar, unless it appear that this defence has been relied on in the action at law.

*Seemle*—That a plea of usury in equity must, as at law, allege that the usurious agreement was made corruptly.

The bill in this case was filed on the 16th September, 1850,  
Statement. and was in aid of an action at law, in which issue had been joined, but no plea of usury had been filed at law.

The defendant now pleaded usury in bar of the discovery sought.

The pleas having been set down for argument,

Mr. *Mowat* in support of them:

At one time it was a question whether a plea of a legal defence could be set up in this court in bar of discovery. The doubt so existing had been created by an expression made use of by Lord *Thurlow* in the case of *Hindman v. Taylor*. (a) The cases of *Mendizabel v. Machado* (b) and *Baillie v. Sibbald* (c) have, it is submitted, removed all doubts on that point; and it is now the admitted practice of courts of equity, that any defence which would operate as a bar to an action at law may be pleaded to discovery sought in this court. A question, however, may arise in this case, whether the pleas can be sustained. It is admitted that the case of *McGregor v. The East India Company* (d) is sufficient to raise a doubt as to the tenability of the present pleas, but in that case there does not appear

(a) 2 B. C. C. 7. (b) 1 Sim. 68. (c) 15 Ves. 185. (d) 2 Sim. 452.

to have been any argument on the point, but the counsel for the plaintiff having objected that the defence did not appear to have been raised at law, and therefore could not be taken advantage of in equity; and as the fact really was that the same matter of defence had been pleaded at law, the counsel for the defendants at once moved to amend the plea in that respect.

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Now here the defence has not been made at law, for the simple fact that the defence could not be proved, having been known only to the plaintiff and defendant. And what the defendant contends for is, that as he is satisfied to defend the action at law on the pleadings as they now stand, if the plaintiff will forego any discovery, it is but just and reasonable that when he does seek such discovery, that every objection open to the defendant at law he should be at liberty to make here. This court will not be active in assisting a party to enforce an illegal demand. The plaintiff has refrained from filing this bill until after issue has been joined at law, and until so long a time has elapsed that that court has refused leave to amend by adding the plea of usury; so that if this plea is overruled, the consequence will be that the defendant may thus be compelled to pay a large demand, for which he never received any value, (the loan having been effected for the benefit of the acceptor of the bill,) and against the recovery of which he has a perfectly good and legal defence, if permitted to take advantage of it.

Argument.

Mr. *Strong*, contra.—It must be admitted at this day, that the doubt suggested by Lord *Eldon*, in *Hindman v. Taylor*, no longer exists, and that it is now clear that a legal defence may be pleaded in bar to a bill of discovery in aid of an action; with this proviso, however, that wherever the action at law has been pleaded to, the defence so relied on in this court must be shewn to have been made at law. *McGregor v. The East India Company* is a direct authority in favour of this proposition; and unless such were the rule of this court, a plaintiff would be always subject to be taken by surprise, by the defendant raising a defence in this court which had never been heard of before. The rule, he

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submitted, was, that unless the discovery sought could be shewn to be useless, the court would enforce it. The plaintiff comes here, seeking a discovery of such facts as will enable him to proceed in the action at law, on the issues there raised, and not a discovery of facts having no bearing upon the case presented in that action. In support of these positions he cited *Wigram on Discovery*, p. 46, *Hare on Discovery*, 48, 56; *Stewart v. Lord Nugent*; (a) *Robertson v. Lubbock*; (b) *Cook v. Wilcock*; (c) *Scott v. Broadwood*. (d)

He also objected that the plaintiff did not aver the agreement to have been contrary to the statute.

*Dawson v. Pilling*; (e) *Drake v. Drake*; (f) *Chadwick v. Broadwood*; (g) and *Smith v. Fox*; (h) were also cited for the defendant.

THE CHANCELLOR.—This case was extremely well argued on both sides. The real points were clearly presented, and all the authorities, so far as we are aware, collected.

Judgment. It is not necessary to consider, upon the present occasion, whether the language of Lord *Thurlow*, in *Hindman v. Taylor*, (i) has not been generally understood in a more enlarged sense than the noble lord intended, and whether there may not be a class of cases to which that language is applicable. (j) Perhaps it may be found, whenever the consideration of the matter becomes necessary, that the reasoning upon which it has been attempted to reconcile the decision of Lord *Thurlow* with subsequent cases, is specious rather than solid; but that point is now unimportant, because it has been expressly decided upon a recent occasion, that the judgment of Lord *Thurlow*, as generally interpreted (and that is sufficient for the present purpose) cannot be regarded as a sound exposition of the law. In commenting upon that decision, the Vice-Chancellor *Wigram* said, (k) “It is now settled, that a party applying to this court for discovery in aid of an action, in which the defendant may by plea or demurrer shew that the plaintiff

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(a) *Keen* 201. (b) 4 *Sim.* 161. (c) 5 *Mad.* 328. (d) 2 *Coll.* 447.  
 (e) 12 *Jurist* 388. (f) 3 *Hare* 528. (g) 3 *Beav.* 315. (h) 6 *Hare* 386.  
 (i) 2 *B. C. C.* 7. (j) *Scott v. Broadwood*, 2 *Coll.* 447. (k) *Smith v. Fox*.

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is not entitled to recover, may raise the defence by plea or demurrer in equity. The justice of the case requires that the defence to the discovery should be open to the defendant in equity; and my recollection of the unreported observations of the present Lord Chancellor, in *Hardman v. Ellames*, upon the case of *Hindman v. Taylor*, satisfies me that such is the rule in his opinion, as well as in that of other judges, though they have not expressly overruled *Hindman v. Taylor*." Mr. *Strong*, indeed, admitted that this conclusion was both well founded in reason and deducible from numerous authorities prior to *Smith v. Fox*; but he contended that the pleas in this case must be overruled, because they oppose the discovery upon grounds not presented as a defence in the court where the action has been brought, (namely, the usurious nature of the contract); thus, not only offering a legal bar, but a legal bar which cannot avail in the court of law, inasmuch as this defence has not been pleaded. Mr. *Strong* also objected to the plea as defective in form.

Judgment.

The arguments upon which Lord *Eldon* attempted to sustain the pleas in *Hindman v. Taylor*, and which have furnished the grounds of the subsequent decisions, seem conclusive. He contended that a plaintiff disentitled to the relief sought at law, could have no right to discovery in equity. He pressed forcibly the analogy furnished by proceedings in courts of equity, where a bar to relief is also a bar to discovery; and presented in a striking light the great evil and injustice which would flow from an opposite determination, according to which a party, upon the mere suggestion of an intention to proceed at law, would be enabled to enforce the most important discovery, upon matters in which he might not have the most remote interest.

Lord *ThurLOW*, on the other hand, thought, and so determined, that a plea to the action could not be made a plea to the discovery. He thought that, to allow such a plea to stand, would be, to put every thing into a wrong train—would be, to draw the consideration of the whole merits from the court of law, in which the action had been instituted,

1850. and where alone it could be properly determined, into the court of equity—a proceeding alike contrary to reason and beyond his competence.

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Now, although the conclusion at which Lord *Thurlow* arrived, that discovery in aid of an action at law ought to be enforced in the face of a plea displacing all right to relief at law, has been determined to be unsound, yet the principle upon which he proceeded remains firmly established. Lord *Thurlow* thought that this court has no jurisdiction to determine the legal merits of an action depending in a court of common law; that is not to be questioned. But his lordship's conclusion, that therefore discovery in aid of an action at law must be enforced without regard to the plaintiff's right to relief at law, is obviously unsound. This court can with propriety compel a defendant at law to assist by discovery the trial of issues at law, only where the plaintiff's right to relief at law is well founded; just as discovery, in the course of proceedings here, is based upon the right to relief. That right to relief, then, upon which the right to discovery is consequent, must necessarily form a proper subject of discussion here. But then the subject of relief, which may properly be discussed here, is not the abstract right of the plaintiff to recover under all circumstances, but his right to recover upon the issues joined, for the better trial of which the discovery is sought. To compel a defendant to make discovery, where the plaintiff can have no relief upon the record as it stands, is open to all the objections so forcibly urged in *Hindman v. Taylor*; but to compel such discovery when the right to relief upon the existing record is not denied but confessed, is open to no such objection. To extend the jurisdiction in the way contended for, would be to base the plaintiff's right to discovery for the trial of certain issues joined at law, not upon his right to relief upon those issues which have been joined, but upon his right to relief upon certain other issues which have not been joined, and which, under existing circumstances, we must assume never will be joined. We should then refuse discovery, not because there *cannot* be relief upon the defence actu-

ally made at law, but because there *ought not* to be relief upon another defence, upon which the defendant has elected not to rely. In other words, we should withdraw the consideration of the whole merits from the proper tribunal. That proposition is unsupported by authority, and seems to us contrary to principle; whilst the reasoning upon which we have arrived at the conclusion that these pleas must be overruled, is not only sanctioned by direct decision, (a) but seems impliedly admitted by those judges who have expressly repudiated the authority of *Hindman v. Taylor*. (b)

It was argued further, that these pleas are defective in point of form, and must therefore be disallowed. It is unnecessary under present circumstances to determine the point thus raised, which is supported by considerable authority. But we may remark, that in another respect, the pleas would seem plainly defective, unless indeed the rules adopted at law are to be considered inapplicable. There is here no allegation that the agreement for usurious interest was corruptly made. Such an allegation is indispensable in a plea at law, because excessive interest may have been received without any corrupt motive—without any intention of infringing the statute. It may have been so received by mistake of the party himself, or of his scrivener. As a necessary consequence, a plea at law wanting such a material allegation, upon which issue may be joined, would, I apprehend, be defective. This reasoning would seem equally applicable here. But it is unnecessary to decide this point, because we are of opinion that upon the general ground the pleas must be disallowed with costs.

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Judgment.

(a) *McGregor v. East India Co.*, 2 Sim. 452; *Stewart v. Lord Nugent*, 1 Keen 201.

(b) 6 Hare 386; *Drake v. Drake*, 3 Hare 523.

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## NEWTON V. DORAN.

*Partnership—Exclusion.*

Articles of co-partnership provided, that a manager of the co-partnership business should be appointed by a majority of the co-partners, and subject to their control; and a manager was accordingly appointed, who was subsequently dismissed by a majority, but remained nevertheless in the management at the request of another partner: *Held*, that this was such misconduct in such partner as entitled the others to a dissolution. (a)

This was a motion for an injunction and receiver against the defendant *Doran*.

By the articles of co-partnership entered into between the plaintiffs and the defendant *Doran*, it was stipulated "that a fit and proper person should forthwith be appointed by the said co-partners as manager and cashier of the said co-partnership trade or business, who shall keep all books and accounts. \* \* \* And that the said manager should have the management of the affairs, accounts and business of the said co-partnership, subject to the direction of the majority of the co-partners." The partnership articles further provided

Statement.

that the several co-partners might be employed at wages by the manager in carrying on the affairs of the partnership. The bill stated that the plaintiff *Newton* had been employed and worked in the factory of the co-partnership as operator from the day of the date of the articles until, &c.

It further appeared that the defendant *Towns* had, on the first of January, 1846, against the consent of *Newton*, been appointed manager of the business of the said co-partnership by a majority of the members thereof; and a memorandum of agreement, in the following words, was signed by them and *Towns*:—"An agreement by the majority of the co-partnership of the Peterboro' Woollen Manufactory and *Robert Towns*, until such time as the majority of the said company find any fault of dishonesty, that the said person shall have full power over the whole establishment without control." That in consequence of certain acts of misconduct on the part of *Towns*, the plaintiffs had dismissed him from his situation of manager and book-keeper of the said business; notwithstanding which, however, he, with the

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(a) See this case reported *ante* page 473.

concurrence of *Doran*, still persisted in exercising the rights of such manager and book-keeper; contending that his appointment to the situation was irrevocable except “for any fault of dishonesty.”

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The plaintiffs alleged many other acts of exclusion and other misconduct on the part of the defendants, in regard to which a good deal of contradiction existed in the respective affidavits of the plaintiffs and defendants. It appeared, however, that the defendants had the sole control of the business. The plaintiffs asserted that this arose from the defendants excluding the plaintiffs. The defendants, on the other hand, alleged that it arose from the voluntary act of the plaintiffs.

Under these circumstances, a motion was now made by Mr. *Mowat* and Mr. *Read*, for the plaintiffs, for an injunction and receiver.

Mr. *Turner* contra.

THE CHANCELLOR.—The articles of co-partnership in this case provided that a manager of the business should be appointed by the majority of the co-partners, and subject to their control. The defendant *Towns* was appointed, against the consent of *Newton*, by the three other partners. The *Wilsons* have taken no part in the management of the business. *Newton* and *Appleyard* have confessedly been absent from the partnership establishment, and had no share in its management for a considerable period; and *Doran* and *Towns* have been constantly in the possession and the control of the concern. The plaintiffs allege that *Doran*, with the assistance of *Towns*, has excluded them from that share in the business to which they were entitled, and they demand a dissolution of the co-partnership, and now seek an injunction and receiver in anticipation of that event. The evidence upon which we have to decide this question is contradictory; but it appears beyond the possibility of doubt that the plaintiffs having dismissed *Towns* from the situation of manager and cashier of the establishment; he has nevertheless continued in the management and control of the business, and that with the sanction and at the request of *Doran*. It may be that this individual is

Judgment.

1850. not a free agent, but is under the influence of a person of stronger character than himself. The result, however, must be the same; the two defendants are doubtless combined, and the plaintiffs have not that authority in the management of the business to which they are entitled. We think the appointment of *Towns* was necessarily revocable in its nature, and that the plaintiffs, having exercised their undoubted privilege in dismissing him from his situation, his persistence in the management and control of the business without their sanction is such an exclusion as entitles the plaintiffs to a dissolution, and consequently upon this application to an injunction and receiver. The application must therefore be granted.

Newton  
v.  
Doran.

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AN  
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Where an agent is empowered not merely to sell; but "to sell and convey," authority to receive payment of the purchase money is implied.—*Farquharson v. Williamson*, 93.

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Where an error occurs in drawing up any of the papers in a cause, and it is necessary to have the mistake rectified, the party applying for that purpose must pay the costs of the motion.—*Emmons v. Crooks*, 558.

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ANNUITY.

*Quære*.—Whether the English annuity acts are in force in this country—but if they are, a bill to enforce an annuity deed need not

allege the enrolment of a memorial as required by those acts; and a defendant cannot, at the hearing, take any objection for want of such enrolment, unless he has set up such defence by his answer.—*Emmons v. Crooks*, 159.

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See "Mortgagee," 1.

ASSIGNMENT.

*For benefit of creditors.*

Certain creditors, with the concurrence of the debtor, and after notice of an assignment by him of every thing for the benefit of his creditors *pari passu*, entered up judgment against the debtor, issued execution thereon, seized goods and chattels of the debtor, which were covered by the assignment, and refused to execute the assignment or have any thing to do with it; and it having been subsequently decided upon an issue, under the Interpleader Act, that the assignment was a valid instrument, and that they therefore could not hold the goods under their execution, they became desirous of ranking

as creditors under the deed, and the trustee refusing, after what had taken place, to consent to this, and having divided most of the trust funds amongst the other creditors, the excluded creditors filed a bill to have the benefit of the deed, the debtor being willing; and on the coming in of the answers, moved for payment into court of the balance in the trustees' hands, which still remained unappropriated; but the court considered the plaintiffs' equity as so doubtful under these circumstances, that they refused the motion with costs.—*McKay v. Farish*, 333.

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#### COSTS.

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#### DEMURRER.

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#### DOWER.

When the widow of a mortgagor has joined in the mortgage to bar her dower in favour of the mortgagee, it is not improper to make her a party to a suit to foreclose the mortgage, although the conveyance contains no express limitation of the equity of redemption to her.—*Saunderson v. Caston*, 349.

#### ENROLLING DECREES.

See "Practice," 40.

#### EQUITY OF REDEMPTION.

A term of 1000 years was created by way of mortgage, and subsequently the interest of the reversioner was sold under an execution against his lands. Upon a bill filed by the mortgagor to redeem, *Held*, that the sale by the sheriff did not carry the equity of redemption, and that the mortgagor was entitled to redeem.—*Chisholm v. Sheldon*, 108.

[Reversed on appeal; see post, vol. iii., p. 65.]

#### EVIDENCE.

1. Where a party charged a defendant with notice of his title, and evidence was adduced of several conversations, in which notice was

distinctly proved to have been given to the defendant; *Held*, that those conversations were admissible in evidence, although not particularly mentioned in the bill, as the fact of *notice*, and not any particular conversation, was the point in issue.—*Barnhart v. Patterson*, 459.

2. Letters are admissible as evidence of the case of the party producing them, though they are not mentioned in the pleadings.—*Wilmott v. Boulton*, 479.

3. The admissions of one partner, that a third person was jointly interested with himself and his co-partners, are not evidence against the latter to prove such joint interest.—*Carfrae v. Vanbuskirk*, 539.

See also "Indian Lands."

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### EXAMINATION.

*Of a defendant as a witness.*

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### EXCLUSION.

See "Partnership," 3.

### EXECUTOR.

In a suit against an executor for an account, it appeared that before the institution of the suit, he had represented to the guardian of the infant plaintiff, that the estate was indebted to him, as such executor, in £16; but in his answer to the amended bill, admitted his indebtedness to the estate in a sum of £187 11s. 6d., while the master reported the true amount to be £356 2s. 8d. The defendant had also stated, in his answer to the original bill, that he had received from the principal debtor of the estate £404 3s. 9d., and no more; while he admitted by his answer to the amended bill that he had so received £519 4s. 5d., which sum he alleged he had received

payment of in goods instead of money, in consequence of the debtor's embarrassments, and that he had not applied any part of this amount to his own use; while the fact, as afterwards discovered, was, that the payment was partly in money, and that *all* received had been applied by the executor to his own use. The court, under these circumstances, charged the executor with the costs of the suit, with interest on the balances from time to time in his hands, and directed the account to be taken with annual rests.—*Erskine v. Campbell*, 570.

See also "Pleading," 3.

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### FEMME COVERT.

See "Pleading," 5.

### FORECLOSURE.

See "Mortgage," 2, 3.

See also "Notice."

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### FURTHER DIRECTIONS.

The decree being defective in several particulars, the court, on further directions, supplied as far as possible the defects of the decree, without a re-hearing of the cause.—*Robertson, v. Meyers*, 560.

### HEIR-AT-LAW.

See "Pleading," 9.

See also "Practice," 34, 50, 52.

### IMPERTINENCE.

See "Practice," 48.

### INDIAN LANDS.

Under the statute of 2 Vic., ch. 15, sec. 1, parol testimony by one witness, deposing to the best of his belief only, to the appropriation of the lands in question to the residence of Indian tribes, and to the non-cession of such lands to her Majesty, is sufficient *prima*

*facie* evidence of those facts.—*The Queen v. Strong*, 392.

In regard to lands in the occupation of the Indians, it is unnecessary, in the proceedings of the commissioners, under the statutes 2 Vic., ch. 15, and 12 Vic., ch. 9, or by express evidence, to negative the exceptions specified in the latter of those statutes.—*Id.*

The finding of the commissioners, under those statutes, is not bad for not adjudging that possession should be relinquished by the trespasser.—*Id.*

### INFANTS.

See "Practice," 49 to 52.

### INJUNCTION.

The mortgagee of a term for years being in possession of the mortgaged estate, will, at the suit of the mortgagor, be restrained by injunction from felling timber on the mortgaged premises, although the mortgagee may have obtained the consent of the reversioner to what he is doing.—*Chisholm v. Sheldon*, 318.

See also "Partnership," 4.

See also "Practice," 10, 23, 30, 44, 53 to 59.

### INSUFFICIENCY.

See "Practice," 48.

### INTEREST.

See "Executor."

### JUDGMENTS.

Registered judgments bind lands from the time of their registration; but they do not, by means of such registration, acquire any priority over previous deeds, though unregistered.—*Bethune v. Caulcutt*, 81.

### LETTERS.

See "Evidence," 2.

### MARRIED WOMAN.

See "Pleading," 5.

### MERGER.

See "Mortgage," 4, 5.

### MORTGAGE—MORTGAGOR MORTGAGEE.

#### ASSIGNEE.

1. Where the administratrix having bought at sheriff's sale the interest of the mortgagor, paid off the mortgage debt, and treating the property as her own absolute estate, afterwards mortgaged the premises; the court, at the instance of the heir-at-law of the mortgagor, directed an enquiry as to whether the property was purchased at sheriff's sale with the assets of his ancestor, and that the amount so applied should be deducted from the amount due upon the mortgage given by his ancestor, and that he should be let in to redeem upon payment of the balance.—*Warren v. McKenzie*, 436.

#### FORECLOSURE.

2. Where a mortgagor had executed several mortgages, in one only of which his wife joined—the proper decree on a bill for foreclosure against the widow and devisees of the mortgagor, is one in the usual form against them all—with a declaration that upon payment of the mortgage executed by the widow, she should, if she chose, be let into her dower.—*Thibodo v. Collar*, 147.

3. A mortgagee who holds several mortgages in fee on the same land, one of which is not due, cannot file a bill to foreclose that mortgage with the others.—*Id.*

#### MERGER.

4. Where a third mortgagee, who took his mortgage without notice of the second mortgage, obtained an assignment to himself of the first mortgage after he had notice of the second, and then purchased the interest of the mortgagor:

*Held*, that under these circumstances, the second mortgage was the only subsisting incumbrance on the property.—*Emmons v. Crooks*, 159.

5. Where a party held a mortgage upon lands, and the mortgagor having afterwards become indebted to the mortgagee in a further sum of money, conveyed the land to him in fee, and some days afterwards the grantee gave the mortgagor a bond to re-convey upon payment of the whole debt: *Held*, that the grantee was entitled to hold the premises, as a security for the whole of his debt, as against a mesne incumbrance, which had been created thereon between the time of his obtaining the mortgage and the conveyance to him in fee, but of which he had not had notice before the execution of the conveyance under which he claimed.—*Street v. Commercial Bank*, 169.

#### PAROL EVIDENCE OF.

6. Where an absolute conveyance is executed with a parol agreement for redemption, and the grantor continues in possession—if the parties so deal with one another as to render such possession clearly referrible to the parol agreement, as by demand and payment of the debt or interest, or some part thereof—such parol agreement will be enforced in equity.—*Le Targe v. De Tuyl*, 227.

7. *Semble*—The circumstance of a grantor continuing for years in possession of property after execution of an absolute conveyance, is alone sufficient to let in evidence of the parol agreement for redemption—in pursuance of which such continued possession took place.—*Id.*

8. *Semble also*—Where it is clear from written evidence that the agreement really made between the parties to a deed, is not that stated in the deed, but the written evidence does not shew what the actual agreement was, parol evidence of it is admissible.—*Id.*

9. Where a party made an assignment of his interest by way of security, which on the face of it purported to be absolute, and remained in possession from the time of the execution of the assignment till the time of the hearing, parol evidence was admitted to shew what the real nature of the transaction was.—*Barnhart v. Patterson*, 459.

#### PARTNERSHIP.

10. Where a mortgage was made to secure a partnership debt, a final order of foreclosure was granted, although one of the co-partners had not executed the power of attorney to receive the mortgage money, or made affidavit of non-payment, it appearing that such partner was, and had been for some time, resident out of the country, and had never interfered in the mortgage transaction in any way.—*Counter v. Wylde*, 538.

#### SALE.

11. *Quære*.—Whether a mortgagee praying a sale can have it when the subsequent incumbrancers or the mortgagor do not consent.—*Bethune v. Caulcutt*, 81.

See also *Myers v. Harrison*, 449.

#### OF TERM FOR YEARS.

12. The mortgagee of a term for years being in possession of the mortgaged estate, will, at the suit of the mortgagor, be restrained by injunction from felling timber on the mortgaged premises, although the mortgagee may have obtained the consent of the reversioner to

what he is doing.—*Chisholm v. Sheldon*, 318.

#### VENDEE (OF MORTGAGOR.)

13. Where, on the sale of an estate, the purchaser executed a re-conveyance by way of mortgage to the vendor, and afterwards sold a part of the property by a deed without covenants, which contained a clause in the following words:—"That I, the said A. M., and my heirs and assigns, and every of them, from all estate, right, title, interest, property, claim and demand of, into or out of the said parcel or tract of land, or any part thereof, are, is, and shall be by these presents for ever excluded and debarred:" upon a bill by his vendees, the original purchaser (and who had executed the mortgage) was decreed to reimburse his vendees the amount they should be compelled to pay in order to discharge such mortgage; and in default, a sale of the portion of the estate retained by him.—*Maitland v. McLarty*, 576.

#### MISCELLANEOUS.

14. Form of a decree upon a bill by a mortgagee, against the infant heir of the mortgagor.—*Sanderson v. Caston*, 349.

15. An order granted, changing place for paying mortgage money.—*Jones v. Bailey*, 353.

16. Where a second mortgage does not notice the first, and contains absolute covenants for title, but there is no allegation in the pleadings, and no other evidence than the mortgage thus affords that the mortgagor did not inform such second mortgagee of the first mortgage before the execution of the second, the court will not assume such to be the case, so as to vest the equity of redemption in such second mortgagee under the stat.

4 & 5 William and Mary, ch. 16, sec. 3.—*Meyers v. Harrison*, 449.

17. Where the amount of money advanced on mortgage was less than the sum mentioned as the consideration money, the mortgagor is at liberty, in taking the account in the master's office, to shew the true sum advanced, with a view to reducing the amount of his liability, although he has not appeared to or answered the bill. He cannot, however, be permitted to shew that the contract was usurious.—*Penn v. Lockwood*, 547.

18. Where a mortgagee takes possession of the mortgage premises, and evicts a tenant of the mortgagor who is willing to continue in possession and pay rent, the mortgagee will be held accountable for the rents from that time.—*Ib.*

See also "Pleading," 13, 14.

See also "Practice," 50 to 52.

#### MULTIFARIOUSNESS.

See "Pleading," 2, 3.

#### NOTICE.

Such circumstances as are sufficient notice to put a party upon enquiry, will not prevail over a registered title, although it might be sufficient in other cases.—*Soden v. Stevens*, 346.

*Quere.*—Whether constructive notice of any kind is sufficient for this purpose.—*Ib.*

See also "Evidence," 1.

#### ORDERS OF COURT.

See "Practice," 60 to 64.

#### PAROL EVIDENCE.

See "Mortgage," 6 to 9.

#### PARTIES.

See "Pleading," 6 to 18.

See also "Practice," 34.

#### PARTNERSHIP.

1. Where a sale is made under

execution issued against one partner, the assignee is only entitled to such partner's interest or share in the assets after payment of the partnership debts—and that, too, even when the debt, originally, was due from the partnership to the execution creditors.—*Partridge v. McIntosh*, 50.

2. In a bill to liquidate the joint liabilities and wind up the affairs of a partnership, the partner whose interest has been so sold is a necessary party.—*Id.*

3. Articles of co-partnership provided that a manager of the co-partnership business should be appointed by a majority of the co-partners and subject to their control; and a manager was accordingly appointed, who was subsequently dismissed by a majority, but remained, nevertheless, in the management, at the request of another partner: *Held*, that this was such misconduct in such partner as entitled the others to a dissolution.—*Newton v. Doran*, 590.

4. Where it was proved that a partner had purchased a house, and a large part of the furniture thereof, with partnership funds, improperly withdrawn by him for that purpose; and such partner being the defendant in the cause, had withdrawn all the partnership books and papers from the jurisdiction of the court, in breach of an injunction in that behalf, the court ordered the mother and sister of the defendant, and whom he had left in possession, to deliver up to the receiver—already appointed—the house and *all* the furniture, as partnership property.—*Prentiss v. Brennan*, 484.

See also "Mortgage," 10.

See also "Practice," 58.

## PETITION.

See "Practice," 7, 65, 66.

## PLEADING.

### ANNUITIES.

1. *Quere.*—Whether the English annuity acts are in force in this country; but if they are, a bill to enforce an annuity deed need not allege the enrolment of a memorial as required by those acts; and a defendant cannot at the hearing take any objection for want of such enrolment, unless he has set up such defence by his answer.—*Emmons v. Crooks*, 159.

### DEMURRER.

2. Three persons carried on business in co-partnership for a short period, when one of them retired; the other two continued to carry on business for some time afterwards, when a dissolution took place, but no settlement of the accounts of either of the co-partnerships was had; one of the partners filed a bill against the other two for an account of the partnership dealings of both firms. To this bill, a demurrer by the partner who had retired, on the ground of multifariousness, was allowed with costs.—*Crooks v. Smith*, 356.

3. Where a mortgage vested in the mortgagee a life estate only, and they, after default, sold the interest of the mortgagor under execution in 1836 for more than the principal, interest and costs, and the purchaser afterwards sold and his vendee went into possession, and afterwards conveyed to trustees of a settlement his interest in the property, but, with their assent, remained in possession, and it appeared that the trustees claimed the whole estate upon the trusts of the settlement: *Held*, on a demurrer by one of the trustees to a bill filed by the mortgagors against the settler and the mortgagees, together with the trustees,

praying redemption, a re-conveyance by all parties, and general relief—that though the plaintiffs were not entitled to what they specifically prayed, yet they were entitled, under the general prayer, to a re-conveyance of the life estate of the mortgagees and an account of the rents and profits; and that the bill was not multifarious.—*Nelson v. Robertson*, 530.

## DISCOVERY.

4. To a bill of discovery in aid of an action at law, to which it appears the defendant has pleaded, the defendant will not be permitted to plead a legal defence in bar, unless it appear that this defence has been relied upon in the action at law.—*Peel v. Kingsmill*, 584.

## FEMME COVERT.

5. In suits by a married woman, respecting her separate property, she must sue separately from her husband, (by her next friend,) and must make her husband a defendant, as otherwise the proceeding is looked upon as exclusively the suit of the husband, and would not be conclusive on the wife or those claiming under her.—*Houlding v. Poole*, 206.

## PARTIES.

6. Where the directors of an incorporated company misappropriated the funds of the corporation, a bill against them and the company, in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all except the directors; the company must be made plaintiffs whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings.—*Hamilton v. Desjardins Canal Company*, 1.

7. Where by the act of incorporation the government is authorised to purchase the corporate estate on payment of its full value, the Attorney-General is not a necessary party to a bill by the stockholders against the directors, complaining of improper conduct on the part of the latter in dealing with the corporate funds.—*Id.*

8. In such case the defendants having answered, admitting certain moneys to have been received by the directors, a motion to pay the amount into court was refused, but the costs of the motion were reserved.—*Id.*

9. In a creditor's bill against the devisees of a debtor, it is not indispensable that the heir-at-law should be a party.—*Fenny v. Priestman*, 133.

10. In a suit by trustees to reduce into possession the trust estate, and in which the existence of the trust estate is called in question by the defendant, the *cestuis que trust* are necessary parties.—*Houlding v. Poole*, 206.

11. Such executors as have proved, may sue without making the others parties, though the latter have not renounced.—*Forsyth v. Drake*, 223.

12. The representatives of a deceased tenant for life of an equity of redemption, are not necessary parties to a bill to foreclose, though the interest on the mortgage fell into arrear during the lifetime of the deceased.—*Id.*

13. A mortgagor having devised his equity of redemption to trustees for his children in fee on their attaining the age of twenty-one: *Held*, that to a bill to foreclose against the *cestuis que trust* after they attain twenty-one, the trustees were not necessary parties.—*Id.*

14. The representatives of the survivor of several joint mortgagees cannot, merely as such, sustain a suit to foreclose, without making the representatives of the other mortgagees parties.—*Id.*

15. When the wife of a mortgagor has joined in the mortgage to bar her dower in favour of the mortgagee, it is not improper to make her a party to a suit to foreclose the mortgage, although the conveyance contains no express limitation of the equity of redemption to her.—*Saunderson v. Caston*, 349.

16. Where a bill is filed against a trustee by parties claiming adversely to his *cestuis que trust*, without making them parties to the bill, it is the duty of the trustee to object that the owners of the estate are not before the court: where, therefore, a trustee under such circumstances neglected to make the objection, the cause was notwithstanding ordered to stand over, with leave to amend by adding parties, without costs.—*Cleveland v. McDonald*, 415.

17. Where several tenants in common, and the husband of one of them, in order to secure a debt due by another of them, executed a mortgage which conveyed a life estate only to the mortgagee; and on default in paying the mortgage money, the mortgagee had sued and obtained judgment and execution against all the mortgagors for the amount of the debt; and under the execution so obtained had sold their reversion, and the mortgage was thereby satisfied, but the purchaser went into possession during the life of the mortgagee: *Held*, that the personal representative of the husband was a necessary party to a suit by the mortgagors for a re-conveyance of the mortgagee's life estate and an account of the

rents and profits.—*Nelson v. Robertson*, 530.

18. In a bill to liquidate the joint liabilities and wind up the affairs of a partnership, a partner whose interest in the assets has been sold by the sheriff under a writ of *fiery facias*, is a necessary party.—*Partidge v. McIntosh*, 50.

#### USURY.

19. An answer setting up a defence of usury, must be as particular in its allegations of the facts, as a plea of usury at law.—(*Semble.*) —*Emmons v. Crooks*, 159.

*Semble.*—That a plea of usury in equity must, as at law, allege that the usurious agreement was made corruptly.—*Peel v. Kingsmill*, 584.

See also "Practice," 17, 23, 34, 35, 36.

#### PRACTICE.

##### ABSENT PARTIES.

1. Where it appeared that a party interested was not before the court, the bill stating such person to be out of the jurisdiction, but no proof was adduced of the fact, the court refused, notwithstanding the consent of the defendant's counsel, to proceed with the cause without such evidence being furnished.—*Michie v. Charles*, 125.

2. The residence, out of the jurisdiction of the court, of a party having a substantial interest, is not now a sufficient reason for proceeding in his absence, where it would have been so, when persons out of the jurisdiction could not in England be served with process; it must also be shewn now to be impossible to effect service upon such absent party. But this is not necessary in case of merely formal parties, nor perhaps of parties having but secondary or unimportant interests.—*Le Targe v. De Tuyl*, 227.

##### ADDING PARTIES.

3. Where a cause stood over

at the hearing, with leave to add parties and to exhibit an interrogatory to prove the will of the testator, and the plaintiffs afterwards amended by making the devisees of the testator co-plaintiffs, and in addition to the interrogatory to prove the will exhibited interrogatories to prove the fact of the persons so added as co-plaintiffs being the parties named in the will; a motion made to expunge those interrogatories, as being unwarranted by the order to amend, was refused with costs.—*Chisholm v. Sheldon*, 425.

## AFFIDAVITS.

4. Where affidavits used upon a motion against a solicitor personally calling upon him to pay in certain moneys received in the course of a cause, were entitled in that cause—omitting any mention of the solicitor: *Held*, that the entitling was sufficient.—*Crooks v. Crooks*, 57.

5. Exceptions to an answer cannot be shewn as cause against dissolving a special injunction; for if the answer be insufficient it may still be used as an affidavit.—*Harrison v. Baby*, 247.

6. *Per ESTEN, V. C.*—Affidavits cannot be used on a motion, where no intention to read affidavits thereon is mentioned in the notice of motion.—*Farish v. Martyn*, 300.

## AGENT.

7. *W. C.* having filed a bill to administer the estate of his father, obtained from the court an injunction enjoining several judgment creditors who had placed executions against the lands of the deceased in the hands of the sheriff from proceeding thereon until a decree for administering the estate could be obtained; after the injunction had been obtained, *W. C.*, by the advice of his solicitor,

sold part of the estate, and the greater portion of the purchase money was retained by the solicitor, upon which he claimed to have a lien for his costs.

A decree was afterwards obtained in the cause, making the injunction perpetual, after which the solicitor advised the conveyance of a large portion of the estate to his (the solicitor's) partner, upon certain trusts, whereby the eldest judgment creditor was entirely excluded from all benefit.

The agent of the solicitor advised a conveyance of another portion of the estate to one of the creditors, and obtained from this creditor a power of attorney to sell, under which he contracted to sell several portions of the lands so conveyed, and received several sums of money on account thereof, which he also applied to his own use, with the exception of certain parts paid to his client.

One of the defendants, upon these facts, filed a petition under the 163rd order praying that it might be referred to the master to enquire and report if the sales have been beneficial to the estate; and if the master should be of that opinion, then that the proper parties might be ordered to pay the amounts received into court.

*Held, per Cur.*—That the proper order to make would be for a reference to enquire and report; and if the sales adopted, then that the money remaining in the hands of the solicitors should be forthwith paid in, without prejudice to the creditors' rights to get rid of the contracts.

*BLAKE, CHANCELLOR, dissentiente.*—Who considered that the proper order to make was for the immediate payment of the money, whatever might be the ultimate disposition thereof.

But *held* also *per Cur.*, that had the petition given notice to the parties that that relief would be asked, sufficient appeared on the affidavits to warrant the court in making an order for immediate payment, pending the enquiry before the master, and that the solicitors could not claim to have any lien for costs.

*Held*, also, that there did not appear sufficient either in the petition or in the affidavits to enable the court to pronounce any judgment as to the liability of the principal for the acts of his agent.

The affidavits and petition were entitled in the causes of Crooks v. Crooks, omitting any mention of the solicitors: *Held*, that the entitling was sufficient.

*Semble*.—That where from the nature of the facts upon which a petition to the court is founded, they cannot be sworn to, it is not sufficient to make use of the short form given in the 163rd order, but that such facts should be stated in the petition, so that the respondents may be made aware to what extent and on what grounds relief is sought against them.—Crooks v. Crooks, 57.

#### AMENDMENT.

8. A motion to amend is no answer to a motion to dismiss for want of prosecution.—McNab v. Gwynne, 127.

9. A plaintiff moving to amend after the time limited by the ninth order (of this court) must shew that the order could not be complied with, though due diligence had been used.—*Id.*

10. Where a defendant upon filing his answer, obtains and serves an order *nisi* to dissolve a common injunction, and the plaintiff thereupon, at any time before the actual dissolution of the in-

junction, amends his bill—the defendant, before proceeding with the application to dissolve, must answer the amendments or be prepared to contend that, even admitting the amendments, to be true, the injunction ought to be dissolved. If he chooses not to proceed with the application to dissolve, the plaintiff must pay the costs incurred before the amendments were made.—Fisher v. Wilson, 218.

11. The defendant in his answer stated the fact of his having proceeded to trial and assessed damages since the filing of the original bill, the defendant thereupon filed a supplemental bill stating those facts more fully, and also the amount of the verdict recovered; to this bill the defendant demurred, on the ground, amongst others, that this new matter was not material, and ought to have been introduced by way of amendment. Demurrer over-ruled, it appearing that the amount of the verdict (which was not given in the answer) might be the point on which the whole case would turn.—McNab v. Gwynne, 240.

12. Although matters which have occurred since the filing of the original bill, when stated in the answer, or other matters explanatory thereof, may be introduced by amendment into the original bill, still no authority exists for holding it irregular to file a supplemental bill for the purpose of stating such matter.—*Id.*

[See 13th of the orders of 1850, as to suits commenced after the 10th May.]

13. A redemption suit having stood over at the hearing, with leave to amend by adding parties as plaintiffs or defendants, the plaintiff added the new parties as

co-plaintiffs, and amended that part of the prayer of the bill which asked that the plaintiffs might be directed to "surrender and deliver up possession of the mortgaged premises" to one of the then plaintiffs; so that in the amended bill it ran thus—that the defendants might "be directed to surrender and to convey or assign for the residue of the term therein created as aforesaid, and deliver up possession of the mortgaged premises to" all the plaintiffs to the amended bill: *Held*, that this amendment was not so unconnected with the order to amend as to render a motion to expunge the same proper.—*Chisholm v. Sheldon*, 294.

14. When a cause stands over with leave to amend by adding parties, the plaintiff has no right to introduce any amendment, though immaterial, that is unconnected with such leave.—*Id.*

15. An amendment of a bill by adding parties, requiring no answer from the defendant, is a waiver of process of contempt for want of answer; and in such a case the court will, on an *ex parte* motion, order the defendant's discharge.—*Thrasher v. Connolly*, 422.

16. Where the plaintiff's solicitor absconded before the time to amend the bill as of course had expired, and his departure was not known to the plaintiff till afterwards, and due diligence appeared to have been used by the plaintiff to proceed with the cause after becoming acquainted with such departure, the court granted leave to amend on payment of costs.—*Carney v. Boulton*, 423.

17. The court refused to give special leave to amend by introducing new matter, where the matter of the proposed amendment

could be proved under the pleadings without such amendment.—*Wilmott v. Boulton*, 479.

18. Where by the order allowing a demurrer, leave is given to amend the bill, and the plaintiff afterwards neglects to amend, the proper course for the defendant to take in such a case, is to move that the plaintiff do amend within a given time, otherwise that the order to amend may be discharged, and the demurrer allowed.—*Nelson v. Robertson*, 530.

#### ANSWER.

19. Exceptions to an answer cannot be shewn as cause against dissolving a special injunction; for if the answer be insufficient, it may still be used as an affidavit.—*Harrison v. Baby*, 247.

#### APPEAL.

20. Executors will be ordered personally to repay costs paid to them or their solicitor under a decree which is afterwards reversed on appeal.—*Davidson v. Thirkell*, 284.

#### ATTACHMENT.

21. A party arrested upon an attachment out of this court is entitled to the benefit of the gaol limits on production to the sheriff of the certificate from the clerk of the crown, of bail having been filed according to the provisions of the statute 10 & 11 Victoria, ch. 15, which places prisoners in custody upon such attachment on the same footing as debtors.—*Davis v. Caspar*, 354.

22. And where in such a case the sheriff took bail to the limits and discharged the prisoner, an order on the sheriff directing him to pay the amount for which the party had been arrested, was refused, the court considering it doubtful whether the act 10 & 11 Victoria, ch. 15, would have the

effect of repealing the provisions of 11 Geo. IV., ch. 3, but left the party to his action at law.—*Id.*

23. Where, by the injunction issued in a cause, the defendant, his agents, &c., were restrained "from preventing the plaintiff, his counsel, &c., from having, and from in any way interfering with their having free access at all times to the books and papers of the said co-partnership, and each and every of them, and from removing such books and papers, or either of them, from the usual place of business of the said co-partnership, and from retaining or keeping, or suffering to be retained or kept, any of the said books or papers in any other place than the place of business of the said co-partnership, until, &c." And upon the plaintiff, who had been a partner of the defendant, applying to the brother and clerk of the defendant for access to the said books, and which had usually been kept locked up in a desk in the place of business of the co-partnership, where such application was made; such clerk answered to the effect, either that he had "instructions not to suffer," or that he had "not instructions to suffer" the plaintiff to see the books, when at the same time he was aware that the books and papers had been removed from their accustomed place to the private residence of the defendant, by the defendant, assisted by his said clerk, and subsequently removed by the defendant to Toronto. *Held*, that the clerk was guilty of a contempt of this court, and was ordered to pay the costs of the motion to commit.—*Prentiss v. Brennan*, 428.

*Quære*.—Whether a party whose committal has been ordered for breach of an injunction, and against

whom a sequestration has been granted for the same contempt, can move against the writ before clearing his contempt.—*S. C.*, 497.

## COSTS.

24. Where on the hearing of the cause it appeared from the plaintiff's evidence that certain persons named in the will of the ancestor of the plaintiff were necessary parties, and had not been brought before the court, leave was given to the plaintiff to amend by adding those parties, notwithstanding the fact that the effect of permitting such amendment would be to enable the plaintiff to vary to some extent the case made and the relief prayed, though not to vary the case or to pray any different relief as against the present defendants; and as the defect of parties did not appear by the bill; *Held*, that leave could only be granted on payment of the costs of the day.—*Chisholm v. Sheldon*, 108.

25. Costs of motion may be given, though not asked for by the notice.—*Sanders v. Cristie*, 137.

26. Where a plaintiff files a bill for relief, and both parties dying after answer, a new bill setting forth substantially the same facts is filed by the plaintiff's heir against the defendant's heir, praying no relief, but a discovery, and to perpetuate the testimony of witnesses, proceedings in the second suit will not be stayed till the costs of the first are paid.—*Street v. Rykman*, 215.

27. *Semble*.—That if both suits were instituted by the same individual, and if he were liable to pay the costs of the first, he would not be prevented from prosecuting the second until he had paid those costs.—*Id.*

28. To enforce payment of a solicitor's costs, taxed upon the petition of the client, entitled in a cause depending, the proper course—under the 92nd order of V. C. Jameson's orders—is by subpœna and attachment, though such costs include costs at law.—*McGill v. Sexton*, 311.

29. When on the taxation of a solicitor's costs, the master, without any order as to the costs of taxation, taxed them and included them in his certificate, and a subpœna and attachment issued in due course for the whole amount included in such certificate, and the client remained in close custody for a considerable time under the attachment, before making any application in regard to the supposed error as to the costs of taxation: the court refused to set aside the subpœna and attachment.—*1b*.

30. Where a plaintiff having obtained the common injunction for want of answer, upon a bill defective for want of parties, the defendant put in his answer and obtained an order *nisi* to dissolve the injunction, before the motion was heard, and on the morning of the day on which it was heard, the plaintiff amended the bill by adding the necessary parties: *Held*, that such amendment was an answer to the objection made on the motion of want of parties; and as the amendment consisted entirely of the addition of parties, and did not materially alter the position of the defendant, and he had not pointed out the objection by his answer; the court refused him the costs of the motion up to the time of the amendment.—*Newton v. Doran*, 473.

#### COUNSEL'S OPINION.

31. Where the plaintiff had

given a mortgage on a steamboat, and the mortgagee afterwards sold the vessel, and the question was whether he was to be charged with the amount of the purchase money, or merely with certain securities received on the sale in lieu of such amount, the defendant (the mortgagee's executor) admitted the possession of a copy of a letter from the mortgagee, refusing to join in the sale, and an opinion of counsel relating to the same matter, but alleged that these documents did "*not relate to the plaintiff's title or the case made by the bill.*" *Held*, that the plaintiff was entitled to production, as the plaintiff's case and that of the defendant were, under the circumstances stated, so interwoven and inseparably connected, that nothing could relate to the one without also relating to the other.—*Hamilton v. Street*, 327.

#### CREDITOR'S BILL.

32. A large body of creditors may be represented by one or more of the number, but in any such proceeding the bill must disclose a sufficient reason for this departure from the rule of practice, requiring all persons interested to be parties to the suit; where, therefore, a bill by one of several creditors, entitled under a deed of trust, was filed and stated "that the creditors of the said L. entitled to the benefit of the said indenture are too numerous to make it practicable to prosecute this suit if they were all made parties:" *Held*, that such statement was too general to satisfy the court that the rule could not be complied with.—*Michie v. Charles*, 125.

33. *Quære*.—Whether necessary to furnish proof of the allegation that parties are too numerous to be all brought before the

court—and whether in a creditor's suit any decree can be made without previous proof of his debt.—*Ib.*

34. In a creditor's bill against the devisees of a debtor, it is not indispensable that the heir-at-law should be a party.—Fenny v. Priestman, 133.

35. Upon a creditor's bill, a receiver of the rents and profits of the testator's real estate will not be granted where the plaintiff does not allege in his bill, and clearly prove, the insufficiency of the personal estate to pay the debts, and does not pray by his bill for the application of the realty or the rents and profits thereof, to that object.—Sanders v. Christie, 137.

#### DEMURRER.

36. A former decision on a point of practice—that defendants before the orders of May, 1850, had in this country, as in England, twelve days only after appearance to demur—was followed, though, if *res integra*, a majority of the present court might have decided the point differently.—Farish v. Martyn, 300.

37. A demurrer filed after twelve days was therefore ordered to be taken off the files for irregularity, with costs. (ESTEN, V. C. *dissentiente*).—*Ib.*

#### DISMISSING BILL.

38. Under the 12th order of this court, the plaintiff is bound to file a replication within one week from the date of entering into the undertaking to speed, whether a commission to examine witnesses shall be required by him or not.—McNab v. Gwynne, 151.

39. Where one of the defendants in a suit had answered, and the time for replying had expired, a motion was then made to dismiss the bill as against him for

want of prosecution, but it appearing that such defendant was president of an incorporated company, whose answer had not yet been filed, the motion was refused with costs.—Rees v. Jacques, 352.

#### ENROLLING DECREES.

40. It is not necessary to petition to enrol decrees, after any lapse of time.—Anonymous, 168.

#### EVIDENCE.

41. Upon a bill against three partners by a person who claimed to be a co-partner, and proved admissions made by two of the three to that effect; no relief could be granted against the two, excluding the third.—Carfrae v. Vanbuskirk, 539.

42. Where the evidence was not sufficiently clear to entitle the plaintiff to a decree, though it was such as rendered his equity probable, the court gave him the option of an issue or to have his bill dismissed without costs.—*Ib.*

#### EXAMINATION

*Of a defendant as a witness.*

43. *Held, per Cur.*—(BLAKE, C. *dissentiente*)—that where a plaintiff examines a defendant, whose interest in the suit is such that a decree for the plaintiff must necessarily operate for the benefit of such defendant, such examination does not disentitle the plaintiff to relief against the other defendants.—McLellan v. Maitland, 268.

#### EXECUTORS.

44. A general charge in a bill, that the defendant, an executrix and trustee, is committing waste on the testator's property, without specifying any *act* of waste, is not sufficient to sustain an injunction or a receiver.—Sanders v. Christie, 137.

#### FORECLOSURE.

45. Where a bill prays a foreclosure, and some of the parties

interested are not before the court, a sale cannot be decreed.—*Be-thune v. Caulcutt*, 81.

46. A bill of foreclosure having been taken *pro confesso* against some of the defendants under the general orders of the court, is not a reason for decreeing a sale as against those defendants.—*Id.*

47. A mortgagee is entitled to a decree for a sale or foreclosure, at his option, as against the mortgagor.—*Meyers v. Harrison*, 449.

#### IMPERTINENCE.

48. Where an answer is referred for impertinence, and the master's report thereon is procured within the time limited for excepting for insufficiency, the plaintiff has still the full time to except for insufficiency.—*Good v. Elliott*, 389.

#### INFANT.

49. Proceedings under the provisions of the provincial statute 12 Vic., ch. 72, respecting the disposition of the estate of infants.—*Re McDonald*, 90.

50. Where a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order and his executor revives the suit and obtains such order, and the mortgage debt equals or exceeds the value of the mortgaged premises—the infant heir is a person seised upon trust, within the meaning of the English statute 11 Geo. IV., and 1 Wm. IV., ch. 10, sec. 6, and may be ordered on petition, without suit, to convey the estate to the executor, or to a purchaser from the executor.—*Re Hodges*, 285.

51. In such a case, however, the court will not make the order, unless it appears that the application of the estate in question is necessary for the satisfaction of the debts of the intestate; and a

reference as to this will be directed.—*Id.*

52. Form of a decree upon a bill by a mortgagee against the infant heir of the mortgagor.—*Saunderson v. Caston*, 349.

#### INJUNCTION.

53. There are many cases in which a court of equity will interfere by injunction to maintain things in *statu quo*, *pendente lite*, not only where the title of the plaintiff to relief is unquestioned, but even where that title is doubtful; provided the court sees that there is a substantial question to be settled.—*Attorney-General v. McLaughlin*, 34.

54. But the court does not interfere by special injunction against a party in possession claiming adversely to the plaintiff; nor on the other hand will the court, as a general rule, so interfere in favour of a party in possession to restrain a casual trespass.—*Id.*

55. On an application on behalf of the Crown for a special injunction, it appeared that the acts and threats complained of occurred eight and eleven months before the filing of the bill, and the motion for the injunction was made twelve months after the answer came in: *Held*, that the application was too late.—*Id.*

56. A defendant may move to dissolve an injunction without moving at the same time to discharge a receiver, previously appointed, of the funds to which the injunction related.—*Sanders v. Christie*, 137.

57. When a special injunction is granted staying proceedings at law, the amount claimed in the action at law must be paid into court.—*Harrison v. Baby*, 247.

58. Where a managing partner was charged, on affidavit of his

co-partner, with excluding the latter from access to the books and papers of the partnership, and with not delivering to him accounts of the state of the business, which the partnership articles had stipulated for—an injunction and a receiver were granted against such managing partner, though the latter in his affidavit denied the principal charges against him, but not satisfactorily.—*Prentiss v. Brennan*, 371.

59. Where to an action on a bond for the rents of certain market dues and fees, fraud, &c., were pleaded, and upon the trial a verdict passed against the defendants, who, after execution had been issued, filed a bill in this court for the purpose of having the bond declared void, on the ground of fraud, &c., and for an injunction restraining proceedings on the execution; to this bill the defendants in equity put in an answer denying the allegations of fraud, whereupon the plaintiffs amended their bill, introducing further charges of fraud, filed affidavits verifying those further charges, and moved for the injunction prayed by the bill; the motion was refused with costs.—*Walker v. City of Toronto*, 502.

#### ORDERS OF COURT.

60. 33rd order.—Where after notice of motion, under the 33rd order [of May, 1850] is served, and before the motion day, the answer is filed, the plaintiff is entitled to his costs of the motion.—*Anonymous*, 423.

61. 75th order.—Where a plaintiff endorses on the copy of the subpoena served on the defendant the notice prescribed by the 75th [old] order of this court, he cannot afterwards proceed by attachment to compel an answer.—*Meyers v. Robertson*, 55.

62. Where the plaintiff had proceeded under the 75th order of this court, had obtained a decree *pro confesso* and the master's report; all the proceedings taken in the master's office having been *ex parte* and without any notice served on the defendant; the court refused to confirm the master's report absolutely in the first instance, notwithstanding that it had been the constant practice of the court to do so ever since the making of the order referred to.—(*ESTEN, V. C., dissente*.)—*Buchanan v. Tiffany*, 98.

See to same effect — *Walsh v. Bourke*, 105; affirmed on appeal in *Hawkins v. Jarvis*, 257.

63. 77th order.—Under the 77th order of May, 1850, the court will decree a reference without prejudice to an injunction previously obtained.—*Prentiss v. Brennan*, 434.

64. 188th order.—Upon the sheriff's return of *non est* to a warrant for the committal of a party, and an affidavit to the effect, required by the 188th of V. C. Jameson's orders, a sequestration will issue at once.—*S. C.* 497.

#### PETITION.

65. On an application by the executor of a mortgagee, for the infant heir of a mortgagee to convey after the executor has obtained a final order for foreclosure; the petition and affidavits should be entitled, not in the cause, but in the matter of the infant.—*Re Hodges*, 285.

66. Where a testator devised his estate (real and personal) upon trust, amongst other things, for the support, &c., of his children until they should attain the age of twenty-one, or marry, and so soon as the youngest attained the age of twenty-one, or married, then to

convey the said estate in equal proportions to the children, with a devise over to his brothers and sisters in the event of the death of all his children under the age of twenty-one and unmarried; a petition presented by the widow and infant children of the testator, praying for a sale of a portion of the corpus of the personal estate, for the purpose of maintaining the family and keeping the houses in repair, was refused with costs.—*McIntosh v. Elliot*, 440.

#### PRO CONFESSO.

67. Where a plaintiff had obtained an order to take the bill *pro confesso* against one of the defendants, and afterwards applied to amend by adding parties without prejudice to the order which had been so obtained: motion refused.—*Herchmer v. Benson*, 92.

#### RECEIVER.

68. The court will entertain a motion to discharge an order for a receiver, though such order was made upon notice.—*Sanders v. Christie*, 137.

See also 56, 58.

#### RE-HEARING.

69. A party is entitled to have a cause re-heard before this court, which has already been heard and re-heard by the Vice-Chancellor alone.—*Cook v. Walsh*, 209.

70. Only one re-hearing before this court will be permitted as of course.—*Id.*

#### REPLICATION, *nunc pro tunc*.

71. Where the plaintiff had proceeded in the cause as if a replication had been filed, and no motion was made by the defendant to have the mistake rectified—the court, after service of the rule to produce and notice of examination of witnesses, allowed a replication to be filed *nunc pro tunc*, on pay-

ment of costs.—*Beckett v. Rees*, 434.

#### RE-SALE.

72. Where an estate was sold under the decree of this court, and in the conditions of sale it was stated erroneously that the property was subject to dower, when in reality the dower attached to the equity of redemption only; in consequence of which the property brought a much less sum than it otherwise would: a re-sale was ordered on the petition of the executors of a party who had been surety to the creditor at whose instance the sale was had; and under the circumstances the costs of the petitioners were ordered to be charged upon the estate.—*Jones v. Clarke*, 368.

73. Where a bill was filed against the heir-at-law for specific performance of a contract entered into by the ancestor, stating that all the purchase money had been paid, but this was not altogether proved at the hearing: the court directed a reference to the master to receive proof of payment of the purchase money, reserving leave to the personal representative to apply in case any part of the purchase money remained unpaid at the decease of the ancestor.—*Farquharson v. Williamson*, 93.

#### SUBSTITUTIONAL SERVICE.

74. Where a plaintiff desires to effect service of the subpoena, by serving the agent of an absent defendant, he must shew that the party to be served is the agent of the defendant in relation to the subject matter of the suit, to such an extent as to satisfy the court that the acceptance of a subpoena by such agent will fall within the authority conferred upon him by his principal: where, therefore, a motion for such an order was

made, grounded on an affidavit which stated that the agent at present conducted the defendant's business of land agent, and had "*acted for the defendant in reference to the mortgage which was the subject matter of the suit*"—the application was refused.—*Passmore v. Nicolls*, 130.

## WARRANT.

75. A warrant to the sheriff to commit a party is not irregular, though no return day is mentioned in it.—*Prentiss v. Brennan*, 497.

## WITNESS,

*Re-examination of.*

76. Where the defendants' solicitor had omitted to ask a witness what had become of a deed mentioned by the witness in the course of his examination, in consequence of which the defendants would have been precluded from giving secondary evidence of the contents: permission to exhibit an interrogatory, to be settled by the examiner, to prove where the deed was, was given to the defendants after the cause had been put in the paper for hearing.—*Covert v. Bank of Upper Canada*, 566.

77. In a creditor's suit a witness had been examined in the master's office touching the claim of an alleged creditor, with a view to the claim being disallowed; after his examination had been concluded, the plaintiff stated on affidavit that since the examination he had learned that the witness could have deposed to the fact of the alleged creditor having admitted that his claim had been settled, and moved to be allowed to re-examine the witness on this point: the motion was refused with costs.—*Patterson v. Scott*, 582.

## MISCELLANEOUS.

78. Where plaintiffs and defendants mutually leave particulars in

the dark, which it is necessary the court should be informed of, a reference on these points will be made to the master.—*Bethune v. Caulcutt*, 81.

79. Where it comes out in the course of a cause that the ancestor of one of the parties to the suit, who claims as heir-at-law, has in fact made a will, it is incumbent on the court to direct an enquiry on that point, although unnoticed in the pleadings.—*Chisholm v. Sheldon*, 108.

80. Where a plaintiff erroneously asserts title in one capacity, but it appears from the statements in the bill that he is entitled in another capacity, the court will give him the relief he seeks.—*Fisher v. Wilson*, 218.

## PRETENDED TITLE.

*Purchase of.*

Where a solicitor of this court purchased a widow's right of dower *in all the lands of which her husband died seised during her coverture*, taking from her an assignment thereof, and a power of attorney to use her name in suing therefor, six years after the death of her husband, and several years after the purchase so made by him, filed a bill in the name of the widow, for the purpose of having dower assigned to her in a particular portion of her late husband's lands—not noticing the sale to himself: the court, on the application of the widow, ordered the bill to be taken off the files, with costs to be paid by the solicitor.—*Meyers v. Lake*, 305.

## PRIORITY.

Priority may be gained by means of prior registration, as between equitable incumbrances, but this priority will be defeated by notice.—*Bethune v. Caulcutt*, 81.

See also "Mortgage," 5.

**PRO CONFESSO.**

See "Practice," 62, 67.

**PRODUCTION OF DOCUMENTS.**

See "Practice," 31.

**RECEIVER.**

See "Practice," 56, 58, 68.

**REGISTRATION.**

1. Priority may be gained by means of prior registration, as between equitable incumbrances, but this priority will be defeated by notice.—*Bethune v. Caulcutt*, 81.

2. Registered judgments bind lands from the time of their registration; but they do not, by means of such registration, acquire any priority over previous deeds, though unregistered.—*Ib.*, but see Stat. 24 Vic., ch. 41.

3. Registration is not notice in this country.—*Street v. Commercial Bank*, 169.

But see provincial statute 13 & 14 Vic., ch. 63, sec. 8.

**RE-HEARING.**

See "Further Directions."

See also "Practice," 69, 70.

**RENTS.**

Where a mortgagee takes possession of the mortgage premises, and evicts a tenant of the mortgagor who is willing to continue in possession and pay rent, the mortgagee will be held accountable for the rents from that time.—*Penn v. Lockwood*, 547.

**REPLICATION.**

*Nunc pro tunc.*

See "Practice," 71.

**RE-SALE.**

See "Practice," 72.

**RESTS.**

See "Executor."

**REVERSIONER (and TERMOR).**

1. The mortgagee of a term for years being in possession of the mortgaged estate, will, at the suit

of the mortgagor, be restrained by injunction from felling timber on the mortgaged premises, although the mortgagee may have obtained the consent of the reversioner to what he is doing.—*Chisholm v. Sheldon*, 318.

2. *Quære.*—Whether the doctrines applicable in England between termor and reversioner, in respect to felling timber, can prevail as to an estate in this country, the beneficial enjoyment of which is ordinarily attained, and can generally be obtained only through the destruction of the growing timber; and whether the doctrines of the common law, as to growing timber, can be applied in all their extent to forest land in this country.—*Ib.* See also "Equity of Redemption."

**RIPARIAN PROPRIETORS.**

An averment that the soil of a stream is vested in the Crown, does not import that the Crown has therefore any power to interfere with the rights of riparian proprietors.—*Attorney-General v. McLaughlin*, 34.

**SALE.**

See "Practice," 45, 46, 47.

See also "Mortgage," 11.

**SEQUESTRATION.**

See "Practice," 23, 64.

**SHERIFF—SALES BY.**

1. Where a sale is made under an execution issued against one partner, the assignee is only entitled to such partner's interest or share in the assets, after payment of the partnership debts, and that, too, even when the debt originally was due from the partnership to the execution creditors.—*Partridge v. McIntosh*, 50.

2. A term of 1,000 years was created by way of mortgage, and subsequently the interest of the

reversioner was sold under an execution against his lands, upon a bill filed by the mortgagor to redeem: *Held*, that the sale by the sheriff did not carry the equity of redemption, and that the mortgagor was entitled to redeem.—*Chisholm v. Sheldon*, 108. [Reversed on appeal in post, vol. iii., p. 655.]

### SOLICITOR.

1. A defendant in equity has no right to call upon the plaintiff's solicitor to produce his authority for using a plaintiff's name; and particularly where no case of improper conduct on the part of the solicitor in using such plaintiff's name, is positively alleged and verified.—*Chisholm v. Sheldon*, 294.

2. Where a solicitor of this court purchased a widow's right to dower *in all the lands of which her husband was seised during her coverture*, taking from her an assignment thereof and a power of attorney to use her name in suing therefor, six years after the death of her husband, and several years after the purchase so made by him, filed a bill in the name of the widow, for the purpose of having dower assigned to her in a particular portion of her late husband's lands—not noticing the sale to himself: the court, on the application of the widow, ordered the bill to be taken off the files, with costs to be paid by the solicitor.—*Meyers v. Lake*, 305.

### *Order to change.*

3. This court will order a party's solicitor to be changed without any condition as to paying the solicitor his costs.—*Meyers v. Robertson*, 439.

See also "Practice," 7.

### SPECIFIC PERFORMANCE.

1. A., by power of attorney, authorised his wife to sell and con-

vey certain lands upon such terms as she should deem suitable and convenient, and immediately afterwards left the province and died abroad. The wife employed B. to find a purchaser, who accordingly agreed with the plaintiff for a sale at a certain price, payable by instalments, with interest; upon payment whereof he was to receive a conveyance, and B. gave his own bond for a deed, in which were contained the terms and conditions of sale. The wife subsequently approved of and ratified the bargain so made, and B., with her consent, let the purchaser into possession of the property bargained for. Upon a bill being filed for specific performance of the contract: *Held*, that this was not a contract in writing, within the meaning of the Statute of Frauds, but that sufficient appeared to authorise the court to decree a specific performance of a parol contract upon the terms of the bond, as being partly performed and within the terms of the authority.—*Farquharson v. Williamson*, 93.

2. Where the owner of an estate stands by and allows a third person to appear as the owner, and to enter into a contract as such, the owner will be decreed specifically to perform such contract.—*Davis v. Snyder*, 134.

3. Where the owner of an estate was present and permitted a third person to agree for the sale of his land, and the purchaser was let into possession, who made improvements, and being afterwards ejected by the owner of the property filed a bill for payment of the value of those improvements: the court allowed a demurrer for want of equity.—*Id.*

4. *Semble*.—That this court in a proper case has jurisdiction to

decree compensation for improvements where the vendor is unable to complete the title to the purchaser, but the court will not make such a decree where specific performance of the contract can be compelled.—*Id.*

5. Where a lot of wild land had been sold in April, 1845, and by a subsequent arrangement a conveyance and mortgage were to be executed in April, 1846; the parties then met, but separated without completing their arrangements, in consequence of the vendor not producing his title deeds, and which he had promised to produce: no further communication passed between the parties, and in August, 1846, the vendor re-sold the premises for somewhat less than he was to have received from the first purchaser, gave the new purchaser a deed and took a mortgage; in the same month, or the next, the second purchaser went into possession and made considerable improvements on the lot, and as he asserted, with the knowledge of the first purchaser; no communication passed between the purchasers until the month of February, 1847, when the first purchaser called on the second and told him that he meant to claim the property under his contract; in August following he filed a bill for specific performance. The cause was brought on for hearing in 1850, and specific performance was decreed with costs.—*McDonald v. Elder*, 513.

See also "Practice," 73.

#### SPEEDING THE CAUSE.

See "Practice," 38.

#### SUBSTITUTIONAL SERVICE.

See "Practice," 74.

#### SUPPLEMENTAL BILL.

See "Practice," 11, 12.

#### SURETY.

See "Practice," 72.

#### TERMOR (AND REVERSIONER.)

See "Reversioner."

#### TIME TO DEMUR.

See "Practice," 36, 37.

#### TRUSTEES.

By a marriage settlement certain property was conveyed to trustees for the benefit of the husband and wife during their lives—remainder to their issue (infants.) After managing the trust estate for several years, the trustees filed a bill to be relieved of the trust, and a decree to this effect was made, which however contained other directions, and under these and some subsequent orders the expenditure of a part of the corpus of the estate in improving the trust property and furnishing the dwelling-house of the parents, and some other variations of the trusts were authorised; one solicitor acted for all the *cestuis que trust*. On the cause coming on for further directions, the court refused to carry out the decree and orders which had been so obtained.—*Baldwin v. Crawford*, 202.

See also "Pleading," 10, 16.

#### USURY.

A stipulation by a party to a deed that he will make certain specified payments—or in default, that the other party may do so and charge more than the legal interest thereon, is not usury.—*Emmons v. Crooks*, 159.

An answer setting up a defence of usury must be as particular in its allegations of the facts as a plea of usury at law (*Semble*)—*Id.*

*Semble.*—That a plea of usury in equity must, as at law, allege that the usurious agreement was made corruptly.—*Peel v. Kingsmill*, 584.

See also "Mortgage," 17.

#### VENDOR'S LIEN

*For unpaid purchase money.*

Where the purchase money of an estate was left unpaid, and a creditor of the purchaser (without notice) sued out an execution against lands, under which the premises in question were sold to the defendant, who had notice, the vendor's lien on the property for the unpaid purchase money was held to attach in the hands of the purchaser at sheriff's sale. *And quære*—Whether if the purchase at sheriff's sale had been completed without notice, the conveyance by the sheriff would not have conveyed the property, subject to all existing equities against the debtor.—*Strong v. Lewis*, 443.

#### WARRANT.

See "Practice," 75.

#### WASTE.

*Quære.*—Whether the doctrines applicable in England between termor and reversioner, in respect to felling timber, can prevail as to an estate in this country, the beneficial enjoyment of which is ordinarily attained, and can generally be obtained, only through the destruction of growing timber; and whether the doctrines of the common law, as to growing timber, can be applied in all their extent to forest land in this country.—*Chisholm v. Sheldon*, 318.

#### WILD LANDS.

See "Specific Performance," 5.

#### WITNESS.

*Re-examination of.*

See "Practice," 76, 77.













